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In the Supreme Court of the United States

OCTOBER TERM, 1984

TACA INTERNATIONAL AIRLINES, S.A.,
Petitioner,

vs.

AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL, AFL-CIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Treaty entered into between the governments of El Salvador and the United States providing for an international arbitration tribunal as the exclusive remedy for dispute resolution precluded the courts below from asserting that jurisdiction, and substituting themselves as decision-making tribunals, in order to rule that El Salvador could not require its sole international carrier to locate its pilots' base in El Salvador.

2. Whether assuming, for the purpose of argument, that no Treaty conferred exclusive jurisdiction on an international arbitration tribunal, the Act of State Doctrine barred the courts below from invalidating the Constitutional requirements of the Republic of El Salvador.

3. Whether assuming, for the purpose of further argument, that the courts below properly determined that the compulsion of foreign law doctrine (rather than the Treaty requirements and the Act of State Doctrine) should be applied, the doctrine of foreign compulsion would have required the removal of the pilots' base of the international carrier of El Salvador from New Orleans to El Salvador due to the legal requirements of El Salvador.

LIST OF PARTIES

The following are listed as parties pursuant to Rule 21 of the Supreme Court Rules:

1. TACA International Airlines, S.A. and its directors, officers, shareholders and employees.

2. The Republic of El Salvador.

3. Air Line Pilots Association, International ("ALPA"), and all pilots who are employees in the class or craft involved and represented in this matter by ALPA.

4. The United States of America.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner TACA International Airlines, S.A. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") entered in this proceeding on December 10, 1984.

OPINIONS BELOW

The opinion of the Fifth Circuit (Appendix A *infra*, A1) is reported at 748 F.2d 965. The Final Judgment and Temporary Restraining Order of the Federal District Court for the Eastern District of Louisiana ("District Court") (Appendix A, *infra* A24 and A36) are unreported.

JURISDICTION

The judgment of the Fifth Circuit was entered on December 10, 1984, and this Petition for Certiorari was

filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, TREATY AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are Article 110, Section 4, the Constitution of the Republic of El Salvador (Appendix B hereto) and the Supremacy clause of the United States Constitution (Appendix B hereto).

The Treaty involved is the Air Transportation Agreement between the United States and El Salvador (Appendix B, A39 hereto).

The statutory provision involved is the Railway Labor Act, at Sections 2, First and Seventh and Sections 5, First and 6, 45 U.S.C. §§ 152, First and Seventh, 155, First and 156 (Appendix B, A63).

STATEMENT OF THE CASE

The Republic of El Salvador enacted a new Constitution on December 20, 1983. Section 110 of the new Constitution in relevant part states:

> ". . . Salvadorian public service companies will have their work center and base of operations in El Salvador."

Petitioner is the sole international carrier of El Salvador. (R. Vol. 3, 113). Its international and national licenses to fly are granted by El Salvador. Defendant's Exhibit 1; see also (R. Vol. 3, 14), and testimony at (R. Vol. 3, 137, 139-140, 156-158), and (R. Vol. 1, 183-188).

Petitioner is licensed to fly into the United States under an Air Transportation Agreement ("the Treaty") en-

tered into between the United States and El Salvador. (Appendix B, A39). Defendant's Exhibit 11; see also (R. Vol. 3, 14). The Treaty allows each nation state to designate, and fully control, the international carriers that it will allow to fly into the other country. (Appendix B, A39).

Petitioner flies from El Salvador as it is hub to various Central American nations, Mexico and the United States (with flights into Miami, New Orleans, Houston, and Los Angeles). (R. Vol. 3, 53 and Vol. 1, 183-188). Petitioner is not permitted to fly any connecting flights within the United States. Defendant's Exhibit 1. All its flights to and from the United States originate, and terminate, in El Salvador (with certain interim stops in foreign nations). See e.g. Plaintiff's Exhibits 7 and 8.

Petitioner previously operated through a United States corporation until required to eliminate any U.S. corporate entity as a condition of continued international route certificates from the CAB. Thereafter, Petitioner, for reasons including United States' requirements, incorporated in El Salvador. (R. Vol. 3, 136-140, 156-159). Its central headquarters are in El Salvador. (R. Vol. 3, 83-84). Over the years Petitioner has changed the nature of its corporate ownership from American to Salvadorian control. As of December 1983, the record shows that 81 percent of Petitioner's stock was owned by Salvadorian citizens. (R. Vol. 1, 183-188 and Vol. 3, 136).

In years preceding enactment of the December 1983 Constitution, the nature of operations shifted; so the only remaining characteristic that would distinguish Petitioner from other international airlines was that its pilots' base remained in New Orleans, even though the flights were (as the record shows) actually originating and terminating in El Salvador—in a manner that required the Salvadorian

pilots to fly up to New Orleans so that they could then commence and terminate flights that centered around El Salvador. (R. Vol. 3, 184). The majority of the pilots are not United States citizens. (R. Vol. 3, 140).

Although Petitioner's pilots' base remained in the United States in New Orleans, 62.7 percent of its pilots are Salvadorian nationals. (R. Vol. 3, 140).

Salvadorian law controls the pilots; and, in addition to their Salvadorian licenses, there are other Salvadorian restrictions. For example, any new pilots for the airline have to be Salvadorian nationals. (R. Vol. 3, 140-141, 159).

While some pilots live in New Orleans, pilots also live in El Salvador. The majority of the pilots, including those who live in the United States, utilize residences in San Salvador, rather than the hotel facilities provided by Petitioner. Defendant's Exhibit 10.

On December 21, 1983 (a day after the Constitution went into effect) labor inspectors from the Ministry of Labor, pursuant to the newly adopted Constitution, ordered Petitioner, to move its pilots' base to El Salvador.[1] (R. Vol. 3, 113).

On December 22, 1983, the Ministry of Labor also ordered that "all the labor relations of said Company and

---

1. See Defendant's Exhibits 2 and 4 (Record Excerpts, Items 6 and 7) (R. Vol. 3, 12 and January 6, 1984 proceedings). The Ministry of Labor noted that Petitioner, in addition to its designation as the flag carrier, was involved in public transportation of passengers, cargo and mail; its administration and control was under Salvadorian stockholders; and its air ships were registered in the records of the Republic of El Salvador. Petitioner was, therefore, ordered as a "Salvadoran enterprise of air transportation public service" to transfer its "Pilots' base to El Salvador, beginning on the twenty-third day of December 1983, according to that prescribed in Article 110, Last paragraph of the Political Constitution". Defendant's Exhibit 4 (Record Excerpts, Item 7).

its employees should be in force by the Salvadorian Laws." See Defendant's Exhibit 4 (Record Excerpts, Item 7).

On December 23, 1983 the Labor General Inspection and Industrial Inspection Section submitted its Notification of Anomaly to the legal representative of Petitioner in El Salvador, requesting correction to meet the requirement that there had to be individual employment contracts with employees serving as pilots. Defendant's Exhibit 6 (Record Excerpts, Item 9).

Petitioner made appropriate arrangements to comply with its government's directives.

On December 23, 1983 Respondent Air Line Pilots Association ("Respondent") protested changes which effectively moved the pilots' base from New Orleans to El Salvador to comply with Salvadorian law. See Plaintiff's Exhibit 9 (R. Vol. 3, 84).

Respondent demanded that relocation changes required by El Salvador be rescinded and threatened legal proceedings in the United States. Respondent maintained that collective bargaining negotiations were in progress in the United States under the Railway Labor Act, and that the *status quo* requirements of that Act had to remain in effect and precluded any change of the pilots' base.

El Salvador, through its Ambassador, communicated with the Ambassador of the United States, to confirm not only that the pilots' base was required to move but that any attempt by any representative of the United States to block the move of the pilot base would be regarded as a violation of the Treaty between the United States and El Salvador. (R. Vol. 1, 178-183). (Record Excerpts, Item 10).

The text of the communication from the Foreign Affairs Sub-Secretary to the American Ambassador Thomas Pickering stated, in relevant part, that Petitioner, as the designated national airline to serve routes provided for in the Treaty, had the right to locate or remove "administrative and sales, technical, and operational personnel and other specialized personnel required to offer the air transport service" and had previously maintained its pilots' base in New Orleans, Louisiana. The communication stated also that El Salvador had the right to control its carrier and request the relocation since:

> [T]he Constituent Assembly of El Salvador, the highest legislative authority, has established in the Political Constitution in force as of December 20, 1983 that: "the salvadorean [*sic*] enterprises for public services will have its working headquarters and operations base in El Salvador" to which injunction TACA International Airlines, S.A. cannot oppose. Therefore, the pilots [*sic*] base has been moved to El Salvador as of the above mentioned date.
>
> I inform your Excellency that any disposition of the United States of America's authorities to impose to [*sic*] our designated airline, TACA International Airlines, the obligation of maintaining the operations base of its pilots in New Orleans, Louisiana, or within the territory of the United States of America, is a violation to [*sic*] the spirit and the terms of the Air Transport Agreement, which has become legal in both countries and which dispositions leave the airline designed [*sic*] by my Government on [*sic*] the freedom not only to establish and maintain its pilots [*sic*] base in any place of the United States of a [*sic*] but also to remove or to transfer this base to El Salvador. (Record Excerpts, Item 10).

Respondent sought to enjoin the move in proceedings in the District Court on Friday, December 29, 1983. On that date, the District Court entered a Temporary Restraining Order and set a final hearing on Respondent's permanent injunction request for the following Friday, January 6, 1984. At the final hearing the District Court received additional documentary evidence, including protests from El Salvador to the United States, which confirmed breach of the Treaty by virtue of the temporary restraining order and noted that:

> This Chancelry [*sic*] has been advised by the air line designated by el [*sic*] El Salvador, TACA International Airlines, S.A., that the Judge of the Federal Court of the United States for the Eastern District of Louisiana has issued a resolution dated December 30, 1983, whereby said airline is obliged to maintain the base of operations of its pilots at New Orleans, Louisiana.
>
> I would like to emphasize to Your Excellency that, according to the Air Transportation Agreement, the designated airlines are entitled to establish and maintain such base at any place inside the other party's territory and to remove or transfer it to the country of origin, in this case, El Salvador.
>
> On the other hand, the Political Convention in force, provides the obligation that "Salvadorean public utility enterprises shall have their work centers and bases of operations in El Salvador", which has obliged TACA International Airlines, S.A., to transfer its pilots' base to my country.
>
> I wish to express to you my Government's concern that the above referenced judicial ruling should constitute a restriction of a permanent nature, which

> will obstruct the development of air transportation in my country, harming not only the above designated airline, but also the users of such service.
>
> Therefore, I respectfully request Your Excellency to advise the competent authorities as to my Government's position in this matter, and its desire to reach, as early as possible, a solution to said problem, in [*sic*] behalf of a greater development of the air transportation relations between our two countries.
>
> I take this opportunity to reiterate to Your Excellency the demonstration of my highest and distinguished consideration. Protest for the Subsecretary of Foreign Affairs of El Salvador, dated January 2, 1984. (Defendant's Exhibit 3; Record Excerpts, Item 11).

The District Court, despite recognition that El Salvador required relocation of the pilots' base of its international carrier (and pilots as well as the airline were under the control of El Salvador), entered a permanent injunction prohibiting the relocation of the pilots' base, ruling that:

A. If there were a Treaty, no interpretation of the Treaty, in the Court's opinion, would enable El Salvador to require relocation of the pilots' base.

B. The Act of State Doctrine did not apply, because El Salvador could not impose its Constitutional or legal requirements on pilots of its international carrier if the requirements affected pilots in the United States contrary to its laws.

C. The doctrine of foreign compulsion was not applicable because it would require a balancing of the equities; and, the pilots' rights superseded the rights of

the carrier even though the carrier was obviously in "an extremely difficult and unfortunate position" and there were no facts that suggested bad faith by the carrier. See R. Vol. 3, 35-43 (Record Excerpts, Item 5, 35-43).

As a result, the District Court asserted jurisdiction under the Railway Labor Act and enjoined Petitioner's relocation notwithstanding requirements of El Salvador.

The Fifth Circuit, after expediting proceedings and allowing the filing of an *amicus curiae* brief by El Salvador Appendix C, A65) in support of Petitioner's request, affirmed the decision below. The Fifth Circuit ruled that there was no merit in any contention advanced by El Salvador or Petitioner as to applicability of the Treaty, the Act of State Doctrine or the Foreign Compulsion Requirement.

REASONS FOR GRANTING THE WRIT

I.

The Governments of El Salvador and the United States Entered Into a Treaty With an Exclusive Remedy for Dispute Resolution Which Precluded the Courts Below From Asserting Jurisdiction, and Substituting Themselves for the Required Decision-Making Process, in Order to Rule That El Salvador Could Not Require Its Sole International Carrier to Locate Its Pilots' Base in El Salvador.

The Courts below ignored the Treaty between the United States and El Salvador and the Treaty's exclusive remedy for resolution of any disputes. The Courts below interjected their own interpretations of the Treaty and in a "Catch-22" approach, concluded that:

A. The Treaty was not intended to replace relevant domestic labor law.

B. The parties did not intend to allow a dispute between private parties "here TACA and ALPA" to be arbitrable.

This reasoning was contrary to the provisions of the Treaty and provisions of international law; since the agreement between El Salvador and the United States is a Treaty and El Salvador invoked the Treaty's terms.

This Court in *Weinberger v. Rossi*, 456 U.S. 25, at 26-36 (1982), concluded that the term "treaty" includes executive agreements concluded by the President. In *Weinberger, supra* at 29, this Court ruled that:

> Under principles of international law, the word [treaty] ordinarily refers to an international agree-

ment concluded between sovereigns, regardless of the manner in which the agreement is brought into force.

Weinberger, supra at page 29, note 5, stated the authority for this general proposition as follows:

> 5. See Vienna Convention on the law of Treaties, May 23, 1969, Art 2, ¶ 1(a), reprinted in 63 Am Jur Int'l L 875, 876 (1969); Restatement of Foreign Relations of the United States, Introductory Note 3, p 74 (Tent Draft No. 1, Apr. 1, 1980) ("[I]nternational law does not distinguish between agreements designated as 'treaties' and other agreements").

Weinberger, supra at 32 also confirmed that a Treaty, such as the one involved here and executed on April 2, 1982, superseded prior Congressional acts, such as the Railway Labor Act—assuming *arguendo* that it would be otherwise applicable in this matter. This Court noted:

> It has been a maxim of statutory construction since the decision in Murray v. The Charming Betsy, 2 Cranch 64, 118, (1804), that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . ." In McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20-21, 9 L.Ed.2d 547, 83 S.Ct. 671 (1963), this principle was applied to avoid construing the National Labor Relations Act in a manner contrary to State Department regulations for such a construction would have had foreign policy implications. The McCulloch Court also relied on the fact that the proposed construction would have been contrary to a "well-established rule of international law." *Id.* at 21, 9 L.Ed.2d 547, 83 S.Ct. 671.

Weinberger required such a result although a treaty provided that the United States must respect laws of

another country, or act in a manner that could discriminate against American nationals. Cf. *Sumitomo Shoji America, Inc. v. Avagliano, et al.*, 456 U.S. 176, 182-183 (1982).

In *Weinberger, supra*, at 34-36, this Court ruled an executive agreement concluded by the President was a treaty that provided for preferential employment of Filipino citizens at United States military enclaves in the Philippines, notwithstanding a Congressional enactment which prohibited employment discrimination against United States citizens on such enclaves unless permitted by a treaty.

Finally, El Salvador sought enforcement of its Treaty, not Petitioner. When El Salvador mandated the removal of the pilots' base by Petitioner from New Orleans to El Salvador, it communicated to the United States not only reasons for removal of the pilots' base but confirmation that removal was pursuant to the Treaty:

> Excellency [Thomas Pickering, United States Ambassador in El Salvador]:
>
> I have the pleasure to address to [*sic*] your Excellency with regard to the Air Transport Agreement between the Government of El Salvador and the Government of the United States of America, signed on April, 1982 in Washington, D.C.
>
> Such agreement is based on the desire of promoting an air transport system based on competition among airlines in the marketplace with minimum governmental interference and regulation, to facilitate the expansion of international air transport opportunities, to make it possible for airlines to offer a variety of service options at the lowest prices and wishing to encourage individual airlines to develop and implement innovative and competitive prices.

The Government of El Salvador has designed [*sic*] the national airline TACA International Airlines, S.A. to serve the routes stated in such Agreement, having this company obtained [*sic*] the authorizations and technical permissions required by the authorities of the United States of America.

The Agreement, with the purpose of granting equal commercial opportunities to the airlines designed by the signatory countries, grants to them the right at his own judgment of establishing offices for the promotion and sales of air transportation within the other country [*sic*] territory as well as to remove and maintain within the territory of the other country, the administrative and sales, technical, and operational personnel and another specialized personnel required to offer the air transport service.

According to this disposition TACA International Airlines, S.A. maintained the operations base for its pilots, and technically specialized personnel, in the city of New Orleans, Louisiana.

Nevertheless, the Constituent Assembly of El Salvador, the highest legislative authority, has established in the Political Constitution in force as of December 20, 1983 that: "the salvadorean [*sic*] enterprises for public services will have its working headquarters and operations based in El Salvador" to which injunction TACA International Airlines, S.A. cannot oppose. Therefore, the pilots [*sic*] base has been moved to El Salvador as of the above mentioned date.

I inform your Excellency that any disposition of the United States of America's authorities to impose to [*sic*] our designated airline, TACA International Airlines, the obligation of maintaining the operations

> base of its pilots in New Orleans, Louisiana, or within the territory of the United States of America, is a violation to [*sic*] the spirit and the terms of the Air Transport Agreement, which has become legal in both countries and which dispositions leave the airline designed by my Government on [*sic*] the freedom not only to establish and maintain its pilots base in any place of the United States of a [*sic*] but also to remove or to transfer this base to El Salvador. (Record Excerpts, Item 10).

Assuming *arguendo* that the United States desired to contest the position of El Salvador, the Treaty provides for consultation and then international arbitration.

The Treaty does not provide that it would only be applicable if the United States Courts first so found. Such a result has been rejected by this Court as an improper "parochial" concept, even in cases which involve private agreements to utilize international arbitration:

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. Absent a contract forum, the considerations relied on by the Court of Appeals would be persuasive reasons for holding an American forum convenient in the traditional sense, but in an era of expanding world trade and commerce, the absolute aspects of the doctrine of the Carbon Black case have little place and would be a heavy hand indeed on the future development of international commercial dealings by Americans. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in

our courts. *M/S Bremen v. Zapata Off-Shore Company*, 407 U.S. 1, at 9 (1972).

It does not serve international interests of the United States to allow the approach utilized by the District Court, which rejected the applicability of the Treaty finding:

> THE COURT: The United States of America did not in the agreement dated April of 1982 contemplate, countenance or even suggest that TACA Airlines could, pursuant to Salvadorian law, move its base of operation from New Orleans to El Salvadore. If you want to make that argument, make it to the Fifth Circuit. You're wasting time making it to this court. It does not cover what you say it covers and it does not say what you say it says. I don't care whether it's a treaty or the ten commandments. (R. Vol. 3, 32).

It does not serve international interests to allow the Fifth Circuit, after receiving the El Salvador *amicus curiae* Brief. specifically requesting that the Court allow international arbitration, of treaty issues, to conclude that representatives of both the United States and El Salvador did not intend the suspension of the application of the Railway Labor Act.

As a result, exercise of this Court's power of supervision is appropriate.

II.

Assuming for the Purpose of Argument, That no Treaty Conferred Exclusive Jurisdiction on an International Arbitration Tribunal, the Act of State Doctrine Barred the Courts Below From Invalidating the Constitutional Requirements of the Republic of El Salvador.

El Salvador mandated that its sole international carrier locate its pilots' base in El Salvador. It protested any attempt of the United States to prevent such a relocation and specifically objected to judicial restrictions. Nevertheless, the Courts below incorrectly concluded that the Act of State Doctrine was not applicable, and that El Salvador could not regulate, or control, the rights of pilots working for its international carrier.

The record shows that the Courts below rejected the right of El Salvador to govern its sole international carrier (a Salvadorian corporation flying international routes originating and terminating in El Salvador) merely because prior to the time that El Salvador changed its laws, the pilots for its flag carrier were based in New Orleans. Yet the record demonstrates that:

A. El Salvador has the total control over Petitioner, its sole international carrier. El Salvador issues Petitioner's licenses not only to fly into the United States but to any location.

B. A majority of the pilots involved are not American citizens. Those who are choose to be employed by the international carrier of El Salvador. They are also licensed by and under the control of El Salvador.

C. The pilots do not work only at the fixed New Orleans base; by definition they pilot the planes of the

international carrier. Since all flights originate out of, and return to, El Salvador, all pilots not only fly solely for the flag carrier of El Salvador but must go to and from El Salvador on every flight.

D. Requiring the pilots' base to remain in New Orleans divests El Salvador of its legitimate interests in control over those who literally and figuratively pilot its nation's flag carrier.

In 1897 this Court formulated what has become known as the "Act of State Doctrine". This Court in *Underhill v. Hernandez,* 168 U.S. 250, 252 (1897), held that:

> The courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.

The Act of State Doctrine has " 'constitutional' underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers." *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 423 (1964).

The Fifth Circuit previously applied the Act of State Doctrine to bar litigation among private parties even where a foreign state was not named as a party. See e.g. *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum, etc., et al.,* 577 F.2d 1196, 1202-1203 (5th Cir. 1978), *cert. denied,* 442 U.S. 928 (1979) (prohibiting a diversity action and an *in rem* action in admiralty alleging tortious conversion of oil, despite parties' control over oil ownership, because to do so required resolving a dispute involving interpretation of the laws of a foreign sovereign); *Compania de Gas de Nuevo Laredo, S.A. v. Entex, Inc.,* 686 F.2d 322 (5th Cir. 1982) (applying the Act of State Doctrine to preclude a tort claim, although plaintiff alleged that the effect of the action complained of occurred

in the United States). The Fifth Circuit noted in *Compania de Gas de Nuevo Laredo, S.A., supra* at 326 that:

> The Restatement (Second) of Foreign Relations Law of the United States section 41 further supports this conclusion:
>
> > [A] court in the United States . . . will refrain from examining the validity of an act of a foreign state by which that state has exercised its jurisdiction to give effect to its *public interest* [emphasis added].

This same result has been required by other Courts in situations similar to the instant case, notwithstanding attempts to argue that American Courts should assert jurisdiction. See e.g. *Hunt v. Mobil Corp.*, 550 F.2d 68, at 71 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977) (the Act of State Doctrine precluded jurisdiction over allegations of a violation of the Sherman Act and other United States laws, although defendants allegedly met in New York to structure concerted activity); *IAM, etc. v. OPEC, etc., et al.*, 649 F.2d 1354, at 1356 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) (the Act of State Doctrine applied even though plaintiff alleged that defendants engaged in price setting activities in violation of United States anti-trust laws and had adverse effects, including "deliberate targeting and victimization of the United States market, directly resulting in higher prices for Americans"); *Clayco Petroleum Corp. v. Occidental Petroleum Corp., etc., et al.*, 712 F.2d 404, at 407 (9th Cir. 1983), *cert. denied*, ... U.S. ....., 104 S.Ct. 703 (1984) (the Act of State Doctrine prevented an anti-trust suit charging that a defendant corporation made secret payments to an official of a foreign country to obtain concessions—notwithstanding allegations that the Foreign Corrupt Practices and Securities Exchange Acts prohibited such payments and that the Court had juris-

diction of the parties—because to rule on the case would involve "the examination of foreign governmental action").

Here, El Salvador not only required that the pilots' base be located in El Salvador pursuant to its Constitution and appropriate governmental decrees, but protested the attempt of the United States through its Executive and its Judicial Branches to prevent such a relocation. In addition, El Salvador explained its public interest concern and its justification for its requirement.

Nor can it be asserted (as has been done by the Courts below) that the "purely commercial" exception to the Act of State Doctrine might be applicable, or that this controversy does not involve "sensitive areas of international relations".

This case is quite different from *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, at 706 (1976), in which this Court discussed the "commercial" nature of an activity arising out of a cigar business for profit.

Here, the communications of El Salvador preclude the pretense that this controversy does not "involve sensitive areas of international relations". El Salvador stated its vital concerns relate to transportation, and confirmed in its *amicus curiae* Brief that the maintenance of Petitioner's pilot base within El Salvador is indispensable to the future security and reliability of its international air carrier (Appendix C, A73, 78, 80-82, 88). Its *amicus curiae* Brief states that "vital national interests of the Republic of El Salvador—the growth and security of its economy—greatly outweigh those of the United States in this case." (Appendix C, A71, 73, 74, 77-82, 84-88, 91).

The Courts below stressed Petitioner's maintenance of its pilot base in New Orleans since 1949, use of the "bene-

fits of American labor and facilities," and emphasized importance of collective bargaining agreements as a central part of American labor law.

Yet if a nation's international carrier establishes a pilot base of long duration in another nation, the nation state's ability to control working conditions (including the base) of pilots flying for its flag carrier should not be jeopardized. The record shows (and the Court can take judicial notice of the fact) that conditions under which Petitioner operated in 1948 changed as Petitioner's ownership became more closely identified with the interests of the Republic of El Salvador. See e.g. R. E. G. Davies, *Airlines of Latin America Since 1919* (Smithsonian Institution Press, 1983), 93-140 (showing the evolution of Petitioner—from an airline competing with Pan Am in other Central and Latin American countries—and its inception as a carrier in Honduras, its expansion and control by American interests [such as Pennsylvania Railroad, Waterman's Steamship Line and even TWA] through its ultimate liquidation of holdings in other countries, and its final reorganization as the El Salvadorian flag carrier). *See also*, for the implications of this in terms of American carriers, M. Bender & S. Altschul, *The Chosen Instrument: Pan Am, Juan Trippe - The Rise and Fall of an American Entrepreneur* (Simon & Schuster, New York, 1982) (noting [at 91]: "Pan American Airways, the nation's first, and for a long while only, airline in foreign service, was built in Washington, D.C."; and [at 230, 232], reliance on Pan Am for American foreign policy and military purposes prior to and through World War II, explaining how the carrier served as a surrogate "stalking bird" for the U.S. Navy).

The United States has a variety of military and economic interests in insuring that its carriers and transportation companies avoid exposure to the type of problems

raised by the decisions of the Courts below as they travel around the world. *See e.g. Alcoa Marine Corporation and International Organization of Masters, Mates & Pilots,* 240 NLRB 1265 (1979) (the National Labor Relations Board has interpreted the National Labor Relations Act to enable a ship which is a United States States flagship to remain under United States jurisdiction, even though it was outside of, and probably would not return to, the United States).

This case also presents matters of important precedent setting policy, as the United States (and other nations) extend air travel in space. See e.g. L. Kanowitz, *American Labor Law and the United States Space Shuttle,* 34 Hastings L.J. 715, at 741 (March 1983), noting that:

> An American spacecraft in space is analogous to an American ocean-going vessel on the high seas. Precedents involving such vessels may be useful in analyzing disruptive labor activity on the shuttle.

Schachter, *Legal Aspects of Space Travel,* 11 J. Brit., Interplanetary Soc'y 14 (1952), quoted in Kanowitz, *supra* at note 120:

> "If we exclude state sovereignty in the outer space what rules will apply? We have an apt analogy in existing international law, viz., the regime of the high seas . . . . [T]he analogy of the high seas can usefully be extended to the spaceships. Each spaceship [including satellite ships], like a vessel, would have a nationality and all such ships would be subject to the applicable laws of the state of nationality." *Id.* at 15.

Complex international interests and concerns of the United States should be taken into consideration, and justify applying the Act of State Doctrine here.

III.

Assuming for the Purpose of Argument That the Courts Below Properly Determined That the Compulsion of Foreign Law Doctrine Should Be Applied, the Doctrine Would Have Required the Removal of the Pilots' Base of the International Carrier of El Salvador From New Orleans to El Salvador Due to the Legal Requirements of El Salvador.

The Courts below concluded that the "compulsion of foreign law doctrine" would not preclude injunctive relief against Petitioner. (R. Vol. 3, 40-42). Assuming for the purpose of argument that the controlling Treaty and Act of State Doctrine did not require the relief sought by Petitioner, the Courts below incorrectly concluded that the compulsion of foreign law doctrine would not apply.

The Courts below, by reference to Section 40 of Restatement (Second), Foreign Relations Law of the United States, confirmed that relief sought by Petitioner was appropriate and that the international carrier of El Salvador should have been allowed to move its pilots' base as required by El Salvador. Section 40 of the Restatement provides:

> § 40. Limitations on Exercise of Enforcement of Jurisdiction
>
> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as
>
> (a) vital national interests of each of the states,

(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,

(c) the extent to which the required conduct is to take place in the territory of the other state,

(d) the nationality of the person, and

(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

Under the foregoing test, the Courts below were required to accommodate El Salvador and permit relocation of the pilots' base, since:

A. El Salvador confirmed its vital interest. *See,* Appendix C, and (Record Excerpts, Items 10 and 11).

B. Inconsistent enforcement actions would create greater problems for Petitioner if it could not comply with the laws of the nation that licensed its operations. Only restraint by El Salvador enables Petitioner to fly. Ultimately, not only the airline's but the pilots' interests depend on El Salvador.

C. The required conduct here involves the location of the pilots' base in El Salvador, the country which licenses the airline for which all the pilots fly. The pilots fly all of their routes through El Salvador and El Salvador has greater contacts and interest in the ability to control the location of the pilots' base than the United States.

D. The nationality of the person test involved requires recognition that Petitioner is not only a corporation of, but is licensed to operate by, El Salvador. Its routes are centered around, and depend upon, El Salvador. The fact that one location to which it flies in another country has previously been the base for the pilots does not con-

vert the airline into a New Orleans operation, or an operation that can exist independently of the legal requirements of El Salvador. This is not a franchise operation, which can be segmented. By definition, the pilots fly all the routes. The record shows that by virtue of establishing a pilots' base in New Orleans, Louisiana, an American union controls the pilots on all of the routes. This further shows the legitimate interests of El Salvador in insisting that pilots be based in El Salvador and regulated by its labor code.

E. The determination of the extent to which enforcement can reasonably be expected to achieve compliance suggests that the provisions of the Treaty and the requirements of El Salvador should control. The Comments on Rule 40 of the Restatement, *supra* at pages 118-119, even state that there are instances in which "international arbitration or adjudication may be more effective" than other types of judicial proceedings. This is true here, due to the Treaty. In addition, since Petitioner is totally dependent upon El Salvador in terms of its licenses to fly and its ability to operate, El Salvador has the controlling interests.

The Courts below demonstrated the validity of the criticism that:

> Domestic courts are not really capable of sitting as international tribunals, engaging in even-handed balancing of national interests. Inevitably, the domestic forum identifies its own nation's interest as superior when any but the most *de minimus* relationships exists. H. Maier, *"Resolving Extraterritorial Conflicts, or 'There and Back Again',"* 25 *Va.J.Int'l.L.* 1, 34 (1984).

The Fifth Circuit emphasized that "collective bargaining agreements are a cornerstone of our national labor

policy." Yet it failed to recognize the admonition of Justice Jackson in *Lauritzen v. Larson,* 345 U.S. 571 at 582 (1953), that the criteria for weighing, or balancing, factors between a transaction regulated and the national interest served by asserting authority should be "mutual forbearance":

> "But in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction."

It is only in such a context of "mutual forbearance" that our nation's labor laws are relevant here. The Fifth Circuit quoted the warning of Justice Douglas in *United Steel Workers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960), that should be a give and take so that mutual benefits and interests of parties (such as nation states) to any negotiating process can be recognized by an agreed upon rule of law that is workable. Otherwise, as Justice Douglas cautioned, the result is a system of "leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces."

This Court should evaluate the decisions complained of by Petitioner; since they can be applied by judicial tribunals of other nation states when evaluating rights of the United States, or its nationals, under similar circumstances "dependent solely upon the relative strength, at any given moment, of the contending forces".

CONCLUSION

For these reasons, a wit of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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March 11, 1985

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of March, 1985, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Stephen B. Moldof, Esq., Cohen, Weiss & Simon, 330 West 42nd Street, New York, New York, 10036 and Robert H. Urann, Esq., Barker, Boudreaux, Lamy, Gardner & Foley, 837 Gravier Street, Suite 1400, New Orleans, Louisiana 70112, Attorneys for ALPA.

I further certify that all parties required to be served have been served.

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APPENDIX

APPENDIX A

AIRLINE PILOTS ASSOCIATION,
INTERNATIONAL, AFL-CIO,
Plaintiff-Appellee,

v.

TACA INTERNATIONAL AIRLINES,
S.A., Defendant-Appellant.

No. 84-3036.

United States Court of Appeals,
Fifth Circuit.

Dec. 10, 1984.

Appeal was taken from an order of the United States District Court for the Eastern District of Louisiana, Martin L.C. Feldman, J., of which preliminary and permanently enjoined an El Salvadoran airline from relocating its pilot base, unilaterally changing terms of employment of its pilot employees, recruiting replacement pilots and interfering with the pilots choice of union as their bargaining agent. The Court of Appeals, Politz, Circuit Judge, held that: (1) United States and El Salvador, in entering into Air Transportation Agreement, did not intend a suspension of the application of Railway Labor Act or an abrogation of a prior judicial ruling prohibiting airline from relocating its pilot base to El Salvador in violation of Railway Labor Act, and (2) act of state doctrine did not preclude court from prohibiting El Salvadoran airline from relocating its

pilot base from the United States to El Salvador pursuant to a directive of the Salvadoran Ministry of Labor where such relocation was in violation of the Railway Labor Act.

Affirmed.

1. Labor Relations (Key) 389

Airline's refusal to recognize and bargain with pilots' union, and its unilateral attempt to impose a new labor agreement on its pilot employees violated Railway Labor Act. Railway Labor Act, §§ 2, subds. 1-4, 7, 5, 6, as amended, 45 U.S.C.A. §§ 152, subds. 1-4, 7, 155, 156.

2. Statutes (Key) 223.1
Treaties (Key) 7

Statutes and treaties are to be interpreted, to the maximum extent possible, so as to be consistent and harmonious.

3. Treaties (Key) 7

A language of an international agreement, like any agreement, is to be interpreted according to its plain and obvious meaning, absent a clear indication that the parties intend otherwise.

4. Treaties (Key) 8

United States and El Salvador, in entering into Air Transportation Agreement, did not intend a suspension of the application of Railway Labor Act or an abrogation of a prior judicial holding prohibiting airline from relocating its pilot base to El Salvador in violation of Railway Labor Act. Railway Labor Act, §§ 1-208, as amended, 45 U.S.C.A. §§ 151-188.

5. International Law (Key) 10.8

Under act of state doctrine, courts will not question the validity of actions of foreign governments within their own borders.

6. International Law (Key) 10.8

Purpose of act of state doctrine is to avoid judicial interference with a role of the executive branch in international affairs.

7. International Law (Key) 10.8

Act of state doctrine does not preclude court's review of each and every case which touches upon international relations, however minimal; in determining whether to apply the doctrine, court must weigh a number of factors including the degree of involvement of the foreign state, the affect a judicial decision on a given case will have on our foreign relations and whether a decision in a given case will involve the adjudication of the laws, conduct or motivation of foreign government.

8. International Law (Key) 10.9

Act of state doctrine did not preclude court from prohibiting El Salvadoran airline from relocating its pilot base from the United States to El Salvador pursuant to a directive of the Salvadoran Ministry of Labor where such relocation was in violation of the Railway Labor Act. Railway Labor Act, §§ 1-208, as amended, 45 U.S.C.A. §§ 151-188.

9. International Law (Key) 10.11

In evaluating foreign compulsion defense, court must balance the following factors: vital national interests of

each of the states, extent and nature of the hardship that inconsistent enforcement actions would impose upon the person, extent to which the required conduct is to take place in territory of the other state, nationality of the person, and extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

10. International Law (Key) 10.9

Foreign compulsion defense was not applicable so as to permit El Salvadoran airline to relocate its pilot base from the United States to El Salvador pursuant to a directive of the Salvadoran Ministry of Labor where such relocation was in violation of the Railway Labor Act. Railway Labor Act, §§ 1-208, as amended, 45 U.S.C.A. §§ 151-188.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before TIMBERS,* POLITZ and RANDALL, Circuit Judges.

POLITZ, Circuit Judge:

When TACA International Airlines, S.A. (TACA), in the midst of collective bargaining negotiations, noticed its intent to relocate its pilot base from New Orleans to El Salvador and to impose unilaterally a new labor contract on its employees, the Airline Pilots Association (ALPA) invoked the Railway Labor Act, 45 U.S.C. §§ 151-188, and petitioned for injunctive relief. Finding TACA in violation of sections 2, 5 and 6 of the Railway Labor Act, 45 U.S.C. §§ 152, 155 and 156, the district court entered a

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*Circuit Judge of the Second Circuit, sitting by designation.

temporary restraining order followed, after hearing, by a preliminary and permanent injunction prohibiting TACA from relocating the pilot base, unilaterally changing terms of employment, recruiting replacement pilots and interfering with the pilots choice of ALPA as their bargaining agent.

TACA appeals, joined by the nation state El Salvador as amicus curiae, contending that its actions are authorized by the 1982 Air Transportation Agreement between the United States and El Salvador. TACA further maintains that the act of state doctrine precludes judicial intervention in the controversy and, in any event, its violations of United States law, specifically the Railway Labor Act, are excused by the foreign compulsion defense. Finding no merit in any contention advanced and concluding that the injunction was properly granted, we affirm.

Facts

TACA is incorporated under the laws of El Salvador and four-fifths of its stock is controlled by Salvadorans. The airline flies from El Salvador to Mexico, various nations in Central America, Miami, New Orleans, Houston and Los Angeles. Approximately 62% of the pilots are Salvadoran nationals, many are American citizens and more than one-half live in the United States. All TACA pilots are members of ALPA and regardless of nationality, residence or seniority, all have been based in New Orleans since 1949 when TACA first instituted service between El Salvador and New Orleans. Since 1968, TACA and ALPA have executed successive collective bargaining agreements under the Railway Labor Act.

In 1969, shortly after the first agreement was reached, TACA and ALPA were involved in litigation very similar

to that now before the court. At that time the government of El Salvador requested TACA to relocate the pilot base from New Orleans to El Salvador. When TACA began relocation efforts, ALPA sought injunctive relief, maintaining that if the relocation came to fruition the collective bargaining agreement would be abrogated by Salvadoran law which would bar ALPA's representation of the pilots. The district court agreed and an appropriate injunction issued. On appeal we affirmed, holding in the process that the pilot base dispute was a "major" dispute subject to the court's jurisdiction and not a "minor" dispute resolvable by the Railway Labor Act's adjustment mechanism. *Ruby v. TACA International Airlines, S.A.*, 439 F.2d 1359 (5th Cir.1971).

Since our decision in *Ruby v. TACA*, notable events have occurred which make the present factual situation different from that earlier presented. We must determine whether those changes mandate a result different from that reached in 1971. In October 1979, TACA and ALPA entered into the most recent collective bargaining agreement, amendable as of December 31, 1983. On April 19, 1982, the governments of the United States and El Salvador executed a civil aviation agreement designed to regulate and promote air transportation between the two countries. In October of 1983, TACA and ALPA, in accordance with the terms of the collective bargaining agreement, began negotiations looking to the amendment and continuation of the current agreement.

Events continued. On December 20, 1983, El Salvador adopted a new constitution. Article 110, ¶ 4 of that constitution provides in pertinent part:

> Salvadoran public service companies will have their work center and base of operation in El Salvador.

The following day, officials from the Salvandoran Ministry of Labor ordered TACA to move its pilot base to El Salvador. TACA immediately notified its pilots that the pilot base would be moved to El Salvador, that new, individual contracts including substantial changes were to be executed and that ALPA would no longer be recognized as the pilots' bargaining agent. The pilots were given until December 30, 1983 to accept the new terms or lose their employment with TACA. Meanwhile, TACA began advertising for new pilots, preferably Salvadoran, to fly the airline's equipment. ALPA reacted to TACA's actions by seeking the injunctive relief described above.

Analysis

[1] We note at the threshold that the parties do not dispute that TACA is in violation of section 2 First, Second, Third, Fourth and Seventh, and sections 5 and 6 of the Railway Labor Act, 45 U.S.C. §§ 152, 155, 156. TACA's refusal to recognize and bargain with ALPA, and its unilateral attempt to impose a new labor agreement on its pilot employees violate the Railway Labor Act. These same actions were noted as violations in *Ruby v. TACA*, 439 F.2d at 1363.

Although subject to the charge of unnecessary iteration, we perhaps should remind that collective bargaining agreements are central to American labor law and are the essential threads of its fabric. In an Oliver Wendell Holmes lecture at Harvard Law School, entitled Reason, Contract, and Law in Labor Relations, published in 68 Harv.L.Rev. 999, 1002 (1955), Dean Harry Schulman observed:

> Collective bargaining is today, as Brandeis pointed out, the means of establishing industrial democracy as the essential condition of political democracy, the

> means of providing for the workers' lives in industry the sense of worth, of freedom, and of participation that democratic government promises them as citizens.

A few years later Justice Douglas reiterated in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580, 80 S.Ct. 1347, 1351-52, 4 L.Ed.2d 1409 (1960) (with citations and footnotes omitted):

> A collective bargaining agreement is an effort to erect a system of industrial self-government. When most parties enter into contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability pre-exists the negotiations. Rather it is between having that relationship governed by an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces.

The Air Transportation Agreement

It is TACA's position that the relocation of its pilot base is authorized by the Air Transportation Agreement, an executive agreement, which should be applied to supersede and contravene inconsistent domestic laws, notably including the Railway Labor Act. TACA also contends that Article 14 of the Air Transportation Agreement requires that the pending dispute be resolved by the arbitration mechanism set forth in the agreement.

[2, 3] It is axiomatic that statutes and treaties are to be interpreted, to the maximum extent possible, so as

to be consistent and harmonious. *United States v. Lee Yen Tai*, 185 U.S. 213, 22 S.Ct. 629, 46 L.Ed. 878 (1902). But the language of an international agreement, like any agreement, is to be interpreted according to its plain and obvious meaning, absent a clear indication that the parties intend otherwise. *Maximov v. United States*, 373 U.S. 49, 83 S.Ct. 1054, 10 L.Ed.2d 184 (1963).

[4] The express language of the Air Transportation Agreement reflects that the parties did not intend the agreement to replace relevant domestic labor law. To the contrary. Section 1 of Article 8 of the intergovernmental agreement permits each nation to establish offices within the territory of the other nation "for the promotion and sale of air transportation." Immediately thereafter, in section 2 of Article 8, the parties prescribed:

> The designated airlines of one Party may, *in accordance with the laws and regulations of the other Party relating to entry, residence and employment*, bring in and maintain in the territory of the other Party managerial, sales, technical, operational and other specialist staff required for the provision of air transportation. . . . (Emphasis added.)

This agreement was reached 11 years after our decision in *Ruby v. TACA*. It is apparent that the representatives of the United States and El Salvador did not intend a suspension of the application of the Railway Labor Act or an abrogation of the holding of *Ruby v. TACA*.[1]

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1. Because we find that the Air Transportation Agreement is not inconsistent with the Railway Labor Act. we do not reach the issue of whether the Air Transportation Agreement, an executive agreement, is a "treaty" which can supersede prior acts of Congress. *See* Restatement (Second) of the Foreign Relations Law of the United States § 144. *See e.g. Weinberger v. Rossi*, 456 U.S. 25, 102 S.Ct. 1510, 71 L.Ed.2d 715 (1982).

Nor are we persuaded that the parties to the Air Transportation Agreement intended that a dispute between private parties, here TACA and ALPA, was to be arbitrable under the agreement's provisions. We find no merit in this assignment of error.

Act of State Doctrine

TACA next argues that the act of state doctrine precludes the injunction against TACA's relocation to El Salvador, lifting as a shield the provision of the Salvadoran Constitution requiring all public service companies to have their work center and base of operations in El Salvador. TACA insists that the Salvadoran government's relocation directive is sufficient to invoke the act of state doctrine. We do not agree.

[5, 6] Under the act of state doctrine our courts will not question the validity of the actions of foreign governments within their own borders. The doctrine was elucidated in *Underhill v. Hernandez,* 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456 (1897):

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

The act of state doctrine is not mandated by international law or the Constitution. The doctrine does, however, rest on " 'constitutional' underpinnings." *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 423, 84 S.Ct. 923, 938, 11 L.Ed.2d 804 (1964). The purpose of the doctrine

is to avoid judicial interference with the role of the executive branch in international affairs. As we noted in *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1380 (5th Cir.1980):

> Relegating grievances from acts of this sort to executive channels of international diplomacy, the rule is an embodiment of the deference to be accorded the sovereignty of other nations; it averts potential diplomatic embarrassment from the courts of one sovereign sitting in judgment over the public acts of another.

[7] The act of state doctrine does not preclude our review of each and every case which touches upon international relations, however minimal. In determining whether to apply the doctrine, we must weigh a number of factors. One of these is the degree of involvement of the foreign state. *Industrial Investment Development Corp. v. Mitsui & Co., Ltd.*, 594 F.2d 48 (5th Cir.1979), *cert. denied*, 445 U.S. 903, 100 S.Ct. 1078, 63 L.Ed.2d 318 (1980). A second factor is the effect a judicial decision in a given case will have on our foreign relations. As the Court noted in *Sabbatino*, "the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches." 379 U.S. at 428, 84 S.Ct. at 940. A third and related factor is whether a decision in a given case will involve the adjudication of the laws, conduct or motivation of a foreign government.[2] This principle has been decisive in two cases

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2. An additional limitation on the act of state doctrine, which has become known as the "commercial exception" to the doctrine, may subject a foreign nation to domestic law when that nation is acting in a purely commercial capacity. A majority of the Court has yet to accept the commercial exception. *Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976). Although we have made refer-

(Continued on following page)

before this court in which parties have unsuccessfully invoked the act of state doctrine. *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021 (5th Cir.), *cert. denied*, 409 U.S. 1060, 93 S.Ct. 555, 34 L.Ed.2d 512 (1972); *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706 (5th Cir.), *cert. denied*, 393 U.S. 924, 89 S.Ct. 255, 21 L.Ed.2d 260 (1968).

In *Tabacalera*, the sole shareholder of a Cuban corporation whose assets had been confiscated by the Cuban government, sued to recover the purchase price of tobacco sold prior to the takover to the defendant, an American corporation. We found that the *res* in the case was the debt owed to the plaintiff by an American company in Tampa, Florida. In locating the *res*, Judge Tuttle noted that "the situs of intangible property is about as intangible a concept as is known to the law," and added:

> The situs may be in one place for ad valorem tax purposes; it may be in another place for venue purposes; it may be in more than one place for tax purposes in certain circumstances; it may be in still a different place when the need for establishing its true situs is to determine whether an overriding national concern, like the application of the Act of State Doctrine is involved.

392 F.2d at 714-15 (citations omitted). We then rejected the defendant's contention that, under the act of state doctrine, the confiscation by the Cuban government extinguished the debt. We held that if the *res* is outside the con-

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Footnote continued—

ence to this exception, *Compania de Gas de Nuevo Laredo, S.A. v. Entex*, 686 F.2d 322, 326 (5th Cir.1982); *Industrial Investment Development Corp. v. Mitsui*, 594 F.2d 48, 52 (5th Cir.1979), we have not definitively ruled on it and are not required to do so here.

trol or territory of the foreign state, the doctrine need not apply:

> when a foreign government performs an act of state which is an accomplished fact, that is when it has the parties and the *res* before it and acts in such a manner as to change the relationship between the parties touching the *res*, it would be an affront to such foreign government for courts of the United States to hold that such act was a nullity. . . . [But] these acts are to be recognized under the Act of State Doctrine only insofar as they were able to come to complete fruition within the dominion of the [foreign] government.

392 F.2d at 715-16.

In *Maltina*, Judge Wisdom emphasized that "*Tabacalera* and its predecessors teach that the federal courts are to take a pragmatic view of what constitutes an extraterritorial action by a foreign state." 462 F.2d at 1027. The plaintiff in that case, a successor to a Cuban corporation whose assets had been confiscated by the Cuban government, sought to preserve its right to use the United States trademark the corporation had registered before the confiscatory decree. We found, as a matter of trademark law, that the *res* in the case, the registered trademark of the Cuban corporation, was located in the United States. We then held that we would recognize a foreign sovereign's actions governing property located within the United States only if it was consistent with our policy and laws. Because a taking of property without compensation violates fundamental constitutional principles, we declined to apply the act of state doctrine.

[8] Evaluating these factors in the case at bar we are persuaded that the doctrine presents no bar to the injunction entered by the district court. The factors militate

against TACA's position. In so concluding, we do not denigrate the interest of El Salvador or minimize its participation in this dispute. El Salvador has ordered a corporate national to act consistent with its constitution. In its amicus, El Salvador explains its interest in securing the ultimate relocation of the pilot station of what it views as its national air carrier. However, we must remain cognizant of the fact that El Salvador is not a party to this controversy and that TACA is a private party who voluntarily chose to engage in business within the territorial confines of the United States, thereby becoming subject to all relevant domestic laws. We do not adjudicate the validity of Article 110, ¶ 4 of the Salvadoran Constitution, nor do we comment on El Salvador's regulatory practices and policies involving public service companies. That is not our prerogative. We do adjudicate, however, the legality of TACA's response to the governmental directive it received. Insofar as the relationship between TACA and ALPA, that response must be made in a manner consistent with controlling provisions of United States law, specifically and primarily the Railway Labor Act.

The present controversy does not involve sensitive areas of international relations that require our deference to the initiatives of the executive branch. We are persuaded that the principles announced in *Tabacalera* and *Maltina* are dispositive here. Although Judge Tuttle's observation about the difficulty of determining the situs of intangible property remain true today, the *res* or interest in this case, whether we deem it the pilot base or the collective bargaining agreement, is clearly located in the United States. Since 1949, TACA has maintained its pilot base in New Orleans, availing itself of the benefits of American labor and facilities. Continuously since 1968, TACA has been a party to collective bargaining agreements

with ALPA for its pilots. In 1979, the parties entered into a collective bargaining agreement which is presently amendable. Consistent with the holdings in *Tabacalera, Maltina,* and *Ruby v. TACA,* we cannot give effect to El Salvador's directive to TACA to extinguish *ex parte* the collective bargaining agreement and relocate the pilot base. Those acts directly affect interests located within the United States and contravene fundamental principles of American labor policy. The act of state doctrine will not be given application in this instance.

Foreign Compulsion Defense

[9, 10] TACA claims that its violations of the Railway Labor Act should be excused because they were done under the compulsion of Salvadoran law. In evaluating the foreign compulsion defense, we balance the following factors:

> (a) vital national interests of each of the states,
>
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> (c) the extent to which the required conduct is to take place in the territory of the other state,
>
> (d) the nationality of the person, and
>
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

Restatement (Second), Foreign Relations Law of the United States § 40. *In re Grand Jury Proceedings v. Field,* 532 F.2d 404 (5th Cir.), *cert. denied,* 429 U.S. 940, 97 S.Ct. 354, 50 L.Ed.2d 309 (1976); *United States v. First National City Bank,* 396 F.2d 897 (2d Cir.1968).

For reasons previously discussed, we also find this defense without merit. As we have noted, collective bargaining agreements are a cornerstone of our national labor policy. We neither hold nor suggest that TACA may not relocate its pilot base. We hold only that TACA must relocate its pilot base, and effect the other intended steps in accordance with the substantive law and procedures set forth in the Railway Labor Act and other relevant domestic laws.

The judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 83-6238
SECTION: F

AIRLINE PILOTS ASSOCIATION,
INTERNATIONAL AFL/CIO

VERSUS

TACA INTERNATIONAL AIRLINES

Transcript of Trial Testimony in the above-entitled matter, heard in open court, The Honorable Martin L. C. Feldman, District Judge, presiding, January 6th, 1984.

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John B. Waldrip, Esq.

Reported by:

Rickey P. Marshall
Official Court Reporter
United States District Court
New Orleans, Louisiana

• • •

[35] (OFF THE RECORD)

THE COURT: This matter came on this date on a hearing on a preliminary injunction which was consolidated with the hearing on the permanent injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure.

The previous findings of fact and conclusions of law by this Court on December 29, 1983 at the conclusion of the hearing on the temporary restraining order are now referred to and made a part of the record of this hearing and are adopted by the court as part of its findings of fact and conclusions of law on the preliminary injunction and the permanent injunction.

In addition to the findings of fact and conclusions of law, which the Court adopts from its hearing on December 29, 1983, the Court makes the following supplemental findings of fact and conclusions of law.

The defendant, TACA International Airlines, is subject to the provisions of the Railway Labor Act. If TACA carries out its its attempted removal of the pilot base [36] of El Salvadore, the collective bargaining agreement between the Plaintiff union and the Defendant airline and the collective bargaining relationship between the parties would be frustrated thereby frustrating a longstanding and traditional national economic policy of the United States of America, namely the sanctity of collective bargaining agreements.

The effect of TACA's removal of the pilot base to El Salvadore during the continuation of the terms and conditions of the collective bargaining agreement and prior to the exhaustion by the parties are statutory procedures under Section 5 and 6 of the Railway Labor Act would have the functional effect of ending the union relationship with the airline and would extinguish the collective bargaining relationship.

As the Court finds TACA has indicated its intention to be—in the public advertisement, which is a matter of record and in evidence in this case—TACA claims to act according to its proposal pursuant to the dictates of the laws of El Salvadore and [37] record is silent on the bad faith of TACA Airlines.

Collective bargaining relations between TACA and the union are governed by and subject to the provisions of the Railway Labor Act. The effect of TACA's course of conduct would be to terminate the existing collective bargaining agreement contrary to its terms and contrary

to the provisions of the Railway Labor Act. It would end the union's collective bargaining representation for the TACA pilots, and the collective bargaining relationship now existing between the parties.

It would wholly divest the pilots of the benefits of their existing agreement and the collective bargaining relationship which cannot be compensated solely in monetary terms.

TACA's course of conduct constitutes an attempt to unilaterally modify existing terms and condition of employment in violation of the mandatory provisions of Section 2, first, second and seventh, and Sections 5 and 6 of the Railway Labor Act.

[38] TACA's course of conduct and the evidence offered herein confirms, constitutes and attempt to influence, interfere with and coerce its pilots in the exercise of their rights to the union's collective bargaining representation and the right of the Plaintiff union to represent the TACA pilots in accordance with the existing National Mediation Board certification all in violation of Section 2, third and fourth sub-section of the Railway Labor Act.

To effectuate the provisions of the Railway Labor Act and to prevent immediate and irreparable injury to the Plaintiff union and the airline pilots and to protect the public interests, it is necessary, reasonable and proper that TACA should be preliminarily and permanently enjoined from engaging in the course of conduct described herein and in the Court's prior findings of fact and conclusions of law.

The court is especially persuaded that under the existing state of the law and on these facts, the Act of State Doctrine has no applicability nor does the Act of [39] State Doctrine contemplate the conduct proposed herein.

The Court is especially guided by the Fifth Circuit's 1972 decision of Maltina Corporation versus Kawe Botdling Company, reported at 4-6-2 F.2d, Page 10-21 which involved the power of the nation, Cuba, to dissolve a Cuban corporation and trigger the question of whether Cuba had any authoritarian or juridical control over Cuban assets located in the United States after the corporation was dissolved.

In reversing the District Court, the Fifth Circuit, speaking through Judge John Minor Wisdom, emphasized that in a long line of cases, our courts will not give extraterritorial effect to a confiscatory degree of a foreign state even where directed against its own nationals.

The Court finds that the teachings of Maltina are especially applicable to the facts of this case. And that in effect, if this Court were to give sanction to the constitution and direct of El Salvadore and the directives of its labor ministry, the [40] United States Court would be giving confiscatory effect to the laws of a foreign nation where applied here in the United States.

The Court also feels guided by the Fifth Circuit decision of Marango versus Goosmann Travel Advisors Corporation decided in 1980 and reported at 621 F.2d at Page 13-71 in which the Court adopted the notion that the Act of State Doctrine does not apply to the purely commercial acts of a sovereign state.

The Defendants have suggested that the compulsion of foreign law doctrine should be applied by the Court. Where the compulsion of foreign law doctrine is applicable, one of the pivotal tests in deciding whether or not to grant injunctive relief involves the balancing of equities between the parties.

This court finds that the equities rest with the pilots through their collective bargaining relationship.

The evidence established that although less than half of the pilots are American nationals, more than half of the [41] pilots live in New Orleans, are based in New Orleans and the flights of TACA since 1968 have originated and terminated in New Orleans. Those pilots have made their careers here. Their families and homes are here. They have seniority here which should be determined according to American Law.

Section 40 of the restatement second of foreign relations law of the United States indicates that one of the vital tests a court should apply in balancing the equities is the extent and nature of the hardship that in consistent enforcement action between two states would impose upon the persons infected by the consequences of the foreign law.

While the Court recognizes that TACA Airlines indeed finds itself in an extremely difficult and unfortunate position, the Court finds that the equities on the scale by preponderence of the evidence tipping favor for the Plaintiff.

Therefore, the compulsion of foreign law doctrine does not apply.

Finally, the Court feels bound by [42] the precedent established in the Linseman versus World Hockey Association decision decided by the District Court of Connecticut in 1977 at 439 Federal Supplement, Page 13-25. And the decision of the Second Circuit in 1965 involving the Republic of Iraq against the First National City Bank reported at 352 Federal Second at Page 47 in which the United States Supreme Court denied at 382 U. S. Reporter, Page 1027.

Accordingly, the application for preliminary and permanent injunction requested by the Plaintiffs upon the posting of $5,000 security is hereby granted.

The parties are hereby so notified.

Mr. Moldof, do you have anything else?

MR. MOLDOF: Your Honor, is that an additional $5,000 bond?

THE COURT: No, that is the $5,000 bond which was posted in connection with the temporary restraining order. The bond shall be made applicable to the preliminary and permanent injunction.

MR. MOLDOF: Thank you, Your [43] Honor.

THE COURT: Mr. Fleming?

MR. FLEMING: No, Your Honor.

THE COURT: Gentlemen, I want to state for the record that this Court compliments all of the lawyers in this case for the excellent briefing of very serious public policy issues under what the Court recognizes were extremely limited and emergency circumstances that the lawyers faced.

I further want to compliment all of you on your professional conduct and the way you responded and cooperated with the Court.

I want to thank you very much.

Court will stand in recess.

(END OF PROCEEDINGS)

(Filed January 6, 1984)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 83-6238
SECTION "F"
MAG. DIV. 3

AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL AFL-CIO,
Plaintiff

VERSUS

TACA INTERNATIONAL AIR LINES, S.A.,
Defendant

PRELIMINARY AND PERMANENT INJUNCTION

WHEREAS, the plaintiff in this matter has applied to this Court for a temporary restraining order, and a preliminary and permanent injunction, restraining the defendant, TACA International Airlines, S.A. from implementing a demand that all TACA pilots accept employment in El Salvador on or before January 1, 1984 or suffer loss of employment and replacement, and from taking other action in derogation of its obligations under the Railway Labor Act and its collective bargaining agreement with plaintiff, and

WHEREAS, this Court having entered a temporary restraining order on December 29, 1983 based upon the testimony, exhibits, pleadings, affidavits and other documents and argument of counsel then presented, and having, on January 6, 1984, considered further testimony, evidence and arguments at a hearing on a motion for a preliminary and permanent injunction and it appearing that

immediate and irreparable injury will result to plaintiff unless such preliminary and permanent injunctive relief is issued,

IT IS ORDERED, that conditioned upon the giving by plaintiff of security in the sum of FIVE THOUSAND DOLLARS,

1. The defendant, its officers, employees and agents shall withdraw prior notice to the TACA pilots that each pilot must accept employment in El Salvador on, before or after January 1, 1984 or suffer loss of employment and replacement, and forthwith advise all pilots that said demand is withdrawn;

2. The defendant, its officers, employees and agents shall not take any action to directly or indirectly initiate, implement or otherwise place into effect any determination on removal of pilots and/or line flight operations to El Salvador;

3. The defendant, its officers, employees and agents shall forthwith cease carrying on any program of recruitment and training of pilots to replace the airline pilots in its employ and holding positions on the TACA Pilots' System Seniority List;

4. The defendant, its officers, employees and agents shall not take any action to change existing rates of pay, rules and working conditions of its pilots;

5. The defendant, its officers, employees and agents shall not in any manner influence, interfere with or coerce TACA pilots in their choice of ALPA as their collective bargaining representative;

6. This Order shall become effective immediately and remain in full force and effect.

New Orleans, Louisiana, this 6th day of January, 1984.

/s/ Martin L. C. Feldman
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NUMBER: 83-6238

Thursday, 12/29/83

AIRLINE PILOTS ASSOCIATION,
INTERNATIONAL AFL/CIO
Plaintiff

vs.

TACA INTERNATIONAL AIRLINES
Defendant

UNITED STATES DISTRICT COURT
JUDGE MARTIN L. C. FELDMAN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

APPEARANCES:

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REPORTED BY:

RICKEY MARSHALL
OFFICIAL COURT REPORTER

[3] THE COURT: Gentlemen, I have analyzed the motion papers and the attached exhibits. I've heard the testimony of the witnesses and I have examined the documents in evidence and made exhibits of the moving papers and affidavits.

After considering the testimony of the witnesses, the evidence introduced, the affidavits and all the pleadings which have been filed of record, the Court makes the following findings of fact and conclusion of law.

TACA International Airline is a corporation based in New Orleans and owned substantially by Salvadorian interests resident in the government and country of El Savadore. Less than one-half of the pilots of the airline are American, but all are based in New Orleans and approximately [4] less than half have homes in El Salvadore.

On October 11, 1979, the parties entered into a collective bargaining agreement. The collective bargaining agreement designated the Airline Pilots Association, the Plaintiff herein, as the collective bargaining agent for the airline pilots of TACA International Airlines. Not just the American nationals, but all the pilots of the airline.

The Court further finds that the Plaintiff has been the collective bargaining agent and has represented as such by the Defendant company since approximately 1968. The collective bargaining agreement was amendable by its terms as of December 31, 1983 subject to a 90-day prior notice provision. The parties initiated notice provisions of the contract and notified one another of their intentions to [5] amend the contract.

The first meeting between the parties took place on or about October 25, 1983 in New Orleans, Louisiana, and at that meeting the position of the Plaintiff was presented.

The next meeting between the parties occurred December 6th, 1983 and it was at that meeting that the Defendants' proposals were presented.

Subsequent meetings were held December 7th and December 14th in New Orleans.

On December 14th, the Defendant submitted a more detailed response to the ten points of concern raised by the plaintiffs in their earlier proposals.

A subsequent meeting between the parties was held December 19, 1983 and it was at that meeting for the first time that a new Salvadorian law [6] was mentioned.

On December 20, 1983 the government of El Salvadore adopted a new constitution. Prior thereto, the parties had agreed to meet again on January 17th, 1984. Meanwhile, the contract by its terms was to remain in full force and effect.

However, on December 21, 1983 in El Salvadore and apparently pursuant to the directives of the government of El Salvadore and the Ministry of Labor, representatives of the Plaintiff, were told for the first time that the union would no longer be recognized as the collective bargaining agent for the pilots, and that TACA International Airlines would not bargain with the union and that TACA International Airline would not offer the same things to the pilots as had been present in the current collective bargaining agreement.

[7] The testimony of Mr. Alcane on that point is unrebutted in the record.

On December 23, 1983 the Defendant company promulgated and posted a new pilot's bid schedule which showed for the first time the origination and termination of TACA International Airline flights in El Salvadore

rather than in New Orleans as was the customary practice of the company since 1968 and as was reflected in a prior pilot bid sheet which was posted and which the bargaining agent representative, Mr. Hudingger, was advised about as early as only eight days prior to the promulgation of the new bid schedule on December 23. The new schedule was promulgated without notice to Mr. Hudingger, who is the Master Collective Council Chairman or consultation as required by the terms of the contract.

[8] Subsequently, government representatives notified the American Ambassador that thereafter the Defendant company would be based in El Salvadore and that its pilots would be based there.

TACA also took the position that it was acting pursuant to government directive when it indicated it would not and could not bargain with an American union.

The provision of the constitution of El Salvadore, which has been newly adopted and which purported to require TACA to act as it did was Article 110 of the Constitution of the Republic of El Salvadore.

On December 24, 1983, TACA International Airlines advertised for pilots expressing a preference for Salvadorian pilots. This was done five days before the company sent notice to its current pilots of its refusal to bargain with [9] a foreign union as it characterized the Plaintiff union and accused the union of interference and insisted upon individual pilot contracts with the pilots as opposed to a collective bargaining agreement and told the pilots they would have to fly longer hours for less pay as in the case of a co-pilot with five years' experience as was demonstrated in the record and by testimony. And further that the pilots would be paid in foreign currency as opposed to American currency. Although certain benefits such as

life, medical and hospitalization as well as seniority were stated to be maintained, no mention was made in the notice to the pilots of vacation rights, sick leave benefits, the availability of grievance procedures or minimum pay as had been guaranteed in the collective bargaining agreement and has been outlined in detail in the [10] collective bargaining agreement. The pilots were told that pursuant to government directives, the pilots would be given until 6 PM on December 30, 1983 to indicate whether they would accept the conditions outlined in the new notice in order to remain in the service of TACA International Airlines.

The effect of the proposed removal of TACA International Airlines to the Republic of El Salvadore is as follows and the Court so finds as a matter of fact.

The pilots would have to get to El Salvadore in order to start their flights which would propose to be based in El Salvadore rather than New Orleans and which would terminate in El Salvadore rather than New Orleans as had been the custom since 1968.

None of the rights concerning vacation benefits, sick leave benefits, grievance procedures or minimum pay mentioned and detailed in the collective [11] bargaining agreement were mentioned in the notice and are apparently threatened as a result of the new notice. Although the pilots might get deadhead pay, if the company chose to schedule deadhead pay, whether the company would do so and whether the pilots would receive it is not clear in the present record.

There is, therefore, no showing in the record that the pilots would get such pay en route to their new base.

Also, there is no showing in the record now that the new institution of El Salvadore would protect these pilots

with similar benefits. For example, a pilot with between 16 to 25 years' experience and time with the company would be entitled to 32 vacation days according to the contract. That individual might prefer to have the vacation days rather than the [12] compensation for not taking or not being given those vacation days.

Prior to the events outlined by the Court on April 19, 1982, the United States of America and the Republic of El Salvadore entered into a civil aviation agreement which establishes a working relationship between the countries to promote and regulate air transportation between the two countries.

The civil aviation agreement does not, however, purport by its terms to grant its approval to the proposed abrogation by El Salvadore or to the possible violation of American laws, public policy or vested contractual rights.

The Court has closely examined the civil aviation agreement and finds as a matter of fact, the document does not grant approval by this government to the government of El Salvadore to abrogate or violate American laws, [13] public policy or vested contractual rights.

The Court also finds, however, that TACA was acting pursuant to Salvadorian law and the directives of its Labor Ministry.

This Court has jurisdiction of this matter under the provisions of Title 45 of the United States Code, Section 151, et seq, the National Railway Labor Act and the provisions of Title 28 of the United States Code, Section 1331. All is interpreted in the Fifth Circuit of Ruby vs. TACA, 439 Federal Section F.2d 1359 (Fifth Circuit 1971) decision.

The Fifth Circuit held this is a major dispute, thereby giving the Court jurisdiction under the provision of the Railway Labor Act.

This is a suit for a temporary restraining order and the focus of the Court and the issues at hand concerning [14] the requirements for granting temporary restraining orders. The first element which the Court must consider in the granting of a temporary restraining order is the danger of irreparable injury to those seeking the temporary restraining order.

Matters such as vacation, sick leave and the availability of the grievance procedure are clearly not compensable by monitary award. Payment in foreign currency, working longer for less pay is less of a clear question; but the Court does not reach that issue in view of the findings regarding vacation, sick leave and the threat to grievance procedures which the Court finds are not compensable by monitary award.

The second element that the Court must consider is the preservation of the status quo, and it is the Court's view that little need be said [15] about that because the parties presently are bound by a valid collective bargaining agreement and have been bound similarly for years prior to the agreement in question.

There is no doubt that the collective bargaining agreement is a valid contract, valid according to American law and is an expression of a national economic public policy of the laws of the United States of America.

A third consideration the Court must give if deciding whether to grant a temporary restraining order in this case concerns a balancing of the equities between the parties. The Court readily admits that the equities are very closely balanced. On the one hand at stake are the careers of pilots with 20 years and more service and loyalty to TACA International Airlines. Those careers are imminently affected today. On [16] the other hand, it

is true that TACA International Airlines finds itself obligated or certainly perceives itself to be obligated to follow the directives of the newly adopted constitution of El Salvadore and the Ministry of Labor and argues that it is immune from the consequences of its acts today under the Act of State Doctrine.

The court has carefully considered TACA's predicament, but is more pursueded by the equity that lies with the pilots, who are suddenly confronted with an abrupt and disruptive change in their long careers and in their loyalty to one company.

Similar considerations regarding the Act of State Doctrine have been observed in the case of SEC vs. Banca Della Svizzera Italiana, 92 Federal Rules Division, page 111, Southern [17] District of New York, 1981. There the Court had the difficult task of balancing the problems of potential criminal violations of Swiss Law as opposed to the national economic considerations of the security laws of this country.

In balancing the conflicting considerations there, the Court found and this Court finds that it is persuaded that the collective bargaining agreement like the security laws policy in the SEC case are a cornerstone of the nation's economic policies and must be preserved.

The Court is not persuaded, although it could be at a preliminary hearing, that the Act of State Doctrine applies in this instance where a foreign country is not a direct defendant and where the application of the doctrine would in effect permit [18] or excuse the commission of an illegal act here in this country. Namely the abrogation of a valid, binding collective bargaining contract which represents a long-standing and economic policy of the United States of America.

Similar considerations were reflected and are found in the teachings of United States vs. Sisal, decided by the United States Supreme Court in 1927, and Linesman vs. World Hockey Association, 439 Federal Supplement 1315 decided in 1977; and Republic of Iraq vs. First National City Bank decided by the Second Circuit 353, page 47.

The parties will have an opportunity to convince the Court that the Act of State Doctrine does apply to these facts at a hearing on preliminary injunction.

For now, the Court feels bound [19] by Ruby vs. TACA International Airlines, decided by the Fifth Circuit, 439, where the same dispute was adjudicated, although foreign law didn't in that case mandate clearly or as clearly the conduct that the airline proposes to do today. In that dispute in 1971, the Court did observe that TACA acted at the request of the Salvadorian government and the Court finds little meritorious distinction between the adjudication of the issues between the Ruby case and those present here on this record for purposes of the granting of a temporary restraining order.

Finally, the last element which the Court has to consider in granting a temporary restraining order was the likelihood that the Plaintiff would succeed at a hearing on their preliminary injunction. Although I have [20] indicated that the parties may convince this Court that the Act of State Doctrine does indeed immunize them from the consequences of their proposed conduct as the record presently appears, the proposal violates the Railway Labor Act specifically Title 45 of the United States Code, Section 152.

Accordingly, the application for a temporary restraining order is granted.

The Court will have a hearing on the preliminary injunction and order the hearing on the preliminary injunction and the permanent injunction on the merits the consolidated and tried together.

The hearing is hereby set for January 6th, 1984 at 9AM unless, of course, the parties by consent agree to extend the applicability of the temporary restraining order [21] until a date which the parties will prefer can be agreed upon.

Gentlemen, I would like to hear arguments from the Defense first on the amount of the bond that the Plaintiff should be required by the Court to post. And then I'll ask for a response from the Plaintiff.

[22] CERTIFICATE

I, RICKEY MARSHALL, Official Shorthand Reporter, do hereby certify that the foregoing transcript is true to the best of my ability and understanding.

/s/ Rickey Marshall
Rickey Marshall
Official Court Reporter

(Filed December 30, 1983)

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF LOUISIANA

Civil Action No. 83-6238

AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL, AFL-CIO
Plaintiff,

v.

TACA INTERNATIONAL AIRLINES, S.A.
Defendant.

TEMPORARY RESTRAINING ORDER

WHEREAS, the plaintiff in this matter has applied to this Court for a temporary restraining order, restraining the defendant, TACA International Airlines, S.A. from implementing a demand that all TACA pilots accept employment in El Salvador by January 1, 1984 or suffer loss of employment and replacement, and

WHEREAS, this Court on this 29th day of December, 1983, having heard argument from counsel for the interested parties, and it appearing that immediate and irreparable injury will result to plaintiff unless such temporary restraining order is issued,

IT IS ORDERED, that conditioned upon the giving by plaintiff of security in the sum of FIVE THOUSAND DOLLARS,

1. The defendant, its officers, employees and agents shall withdraw prior notice to the TACA pilots that each

pilot must accept employment in El Salvador by January 1, 1984 or suffer loss of employment and replacement, and forthwith advise all pilots that said demand is withdrawn pending further disposition of this case by the court;

2. The defendant, its officers, employees and agents shall not take any action to directly or indirectly initiate, implement or otherwise place into effect any determination on removal of pilots and/or line flight operations to El Salvador;

3. The defendant, its officers, employees and agents shall forthwith cease carrying on any program of recruitment and training of pilots to replace the airline pilots in its employ and holding positions on the TACA Pilots' System Seniority List;

4. The defendant, its officers, employees and agents shall not take any action to change existing rates of pay, rules and working conditions of its pilots;

5. The defendant, its officers, employees and agents shall not in any manner influence, interfere with or coerce TACA pilots in their choice of ALPA as their collective bargaining representative;

6. This Order shall become effective immediately and remain in full force and effect pending determination of plaintiffs' motion for a preliminary injunction.

IT IS FURTHER ORDERED that the motion of plaintiff for a preliminary injunction be, and it is hereby set for hearing on January 6, 1984 at 9:00 A.M.

New Orleans, Louisiana, this 29th day of December, 1983 at .....

/s/ Martin L. C. Feldman
United States District Judge

APPENDIX B

Constitution of the Republic of El Salvador, Section 110, December 20, 1983, of the new Constitution in relevant part states:

> ". . . Salvadorian public service companies will have their work center and base of operations in El Salvador."

United States Constitution, The Supremacy Clause, Article VII, Section 2:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

US-EL SALVADOR
CIVIL AVIATION AGREEMENT

(English Text)

Original

AIR TRANSPORT AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF EL SALVADOR

The Government of the United States of America and the Government of El Salvador;

Desiring to promote an international air transport system based on competition among airlines in the marketplace with minimum governmental interference and regulation;

Desiring to facilitate the expansion of international air transport opportunities;

Desiring to make it possible for airlines to offer the traveling and shipping public a variety of service options at the lowest prices that are not predatory or discriminatory and do not represent abuse of a dominent position and wishing to encourage individual airlines to develop and implement innovative and competitive prices;

Desiring to ensure the highest degree of safety and security in international air transport and reaffirming their grave concern about acts or threats against the security of aircraft, which jeopardize the safety of persons or property, adversely affect the operation of air transportation, and

undermine public confidence in the safety of civil aviation;

Being Parties to the Convention of International Civil Aviation opened for signature at Chicago on December 7, 1944;

Desiring to conclude a agreement covering all forms of air transportation;

Have agreed as follows:

ARTICLE 1

Definitions

For the purposes of this Agreement, unless otherwise stated, the term:

(a) "Aeronautical authorities" means, in the case of the United States, the Civil Aeronautics Board or the Department of Transportation, whichever has jurisdiction, or their successor agencies, and in the case of El Salvador, the General Directorate of Civil Aeronautics, or its successor agency;

(b) "Agreement" means this Agreement, its Annexes, and any amendments thereto;

(c) "Air transportation" means any operation performed by aircraft for the public carriage of traffic in passengers, baggage, cargo and mail, separately or in combination, for remuneration or hire;

(d) "Convention" means the Convention on International Civil Aviation, opened for signature at Chicago on December 7, 1944, and includes:

(i) any amendment which has entered into force under Article 94(a) of the Convention and has been ratified by both parties, and

(ii) any Annex or any amendment thereto adopted under Article 90 of the Convention, insofar as such Annex or amendment is at any given time effective for both parties;

(e) "Designated airline" means an airline designated and authorized in accordance with Article 3 of this Agreement;

(f) "Price" means:

(i) any fare, rate or price to be charged by airlines, or their agents, and the conditions governing the availability of such fare, rate and price;

(ii) the charges and conditions for services ancillary to carriage of traffic which are offered by airlines; and

(iii) amounts charged by airlines to air transportation intermediaries;

for the carriage of passengers (and their baggage) and/or cargo (excluding mail) in air transportation.

(g) "International air transportation" means an air transportation which passes through the air space over territory of more than one State;

(h) "Stop for non-traffic purposes" means a landing for any purpose other than taking on or discharging passengers, baggage, cargo and mail in air transportation;

(i) "Territory" means the land areas under the sovereignty, jurisdiction, protection, or trusteeship of a Party, and the territorial waters adjacent thereto;

(j) "User charge" means a charge made to airlines for the provision of airport, air navigation or aviation security property or facilities; and

(k) "Full economic costs" means the direct cost of providing service plus a reasonable charge for administrative overhead.

ARTICLE 2

Grant of Rights

(1) Each Party grants to the other Party the following rights for the conduct of international air transportation by the airlines of the other Party:

(a) the right to fly across its territory without landing;

(b) the right to make stops in its territory for non-traffic purposes;

(c) the rights otherwise specified in this agreement.

(2) Nothing in paragraph (1) of this article shall be deemed to grant the right for one Party's airlines to participate in air transportation between points in the territory of the other Party.

ARTICLE 3

Designation and Authorization

(1) Each Party shall have the right to designate as many airlines as it wishes to conduct international air transportation in accordance with this Agreement and Annexes and to withdraw or alter such designations. Such designations shall be transmitted to the other Party in writing through diplomatic channels, and shall identify whether the airline is authorized to conduct the type of air transportation specified in Annex I or in Annex II or in both.

(2) On receipt of such a designation and of applications in the form and manner prescribed from the designated airline for operating authorizations and technical permissions, the other Party shall grant appropriate authorizations and permissions with minimum procedural delay, provided:

(a) substantial ownership and effective control of that airline are vested in the Party designating the airline, nationals of that Party, or both;

(b) the designated airline is qualified to meet the conditions prescribed under the laws and regulations normally applied to the operation of international air transportation by the Party considering the application or applications; and

(c) the Party designating the airline is maintaining and administering the standards set forth in Article 6 (Safety).

ARTICLE 4

Revocation of Authorization

(1) Each Party may revoke, suspend or limit the operating authorizations or technical permissions of an airline designated by the other Party where:

(a) substantial ownership and effective control of that airline are not vested in the other Party or the other Party's nationals;

(b) that airline has failed to comply with the laws and regulations referred to in Article 5 of this Agreement; or

(c) the other Party is not maintaining and administering the standards as set forth in Article 6 (Safety).

(2) Unless immediate action is essential to prevent further non-compliance with subparagraphs (1)(b) or (1)(c) of this Article, the rights established by this Article shall be exercised only after consultation with the other Party.

ARTICLE 5

Application of Laws

(1) While entering, within or leaving the territory of one Party, its laws and regulations relating to the operation and navigation of aircraft shall be complied with by the other Party's airlines.

(2) While entering, within or leaving the territory of one Party, its laws and regulations relating to the admission to or departure from its territory of passengers, crew or cargo on aircraft (including regulations relating to entry clearance, aviation security, immigration, passports, customs and quarantine or, in the case of mail, postal regulations) shall be complied with by or on behalf of such passengers, crew or cargo of the other Party's airlines.

ARTICLE 6

Safety

(1) Each Party shall recognize as valid, for the purpose of operating the air transportation provided for in this Agreement, certificates of airworthiness, certificates of competency, and licenses issued or validated by the other Party and still in force, provided that the requirements for such certificates or licenses at least equal the minimum standards which may be established pursuant to the Convention. Each Party may, however, refuse to recognize as valid for the purpose of flight above its own territory,

certificates of competency and licenses granted to or validated for its own natiionals by the other Party.

(2) Each Party may request consultations concerning the safety and security standards maintained by the other Party relating to aeronautical facilities, aircrew, aircraft, and operation of the designated airlines. If, following such consultations, one Party finds that the other Party does not effectively maintain and administer safety and security standards and requirements in these areas that at least equal the minimum standards which may be established pursuant to the Convention, the other Party shall be notified of such findings and the steps considered necessary to conform with these minimum standards; and the other Party shall take appropriate corrective action. Each Party reserves the right to withhold, revoke or limit the operating authorization or technical permission of an airline or airlines designated by the other Party in the event the other Party does not take such appropriate action within a reasonable time.

ARTICLE 7

Aviation Security

Each Party:

(1) reaffirms its commitment to act consistently with the provisions of the Convention on Offenses and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on September 14, 1963, the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on December 16, 1970, and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on September 23, 1971;

(2) shall require that operators of aircraft of its registry act consistently with applicable aviation security

provisions established by the International Civil Aviation Organization; and

(3) shall provide maximum aid to the other Party with a view to preventing unlawful seizure of aircraft, sabotage to aircraft, airports, and air navigation facilities, and threats to aviation security; give sympathetic consideration to any request from the other Party for special security measures for its aircraft or passengers to meet a particular threat; and, when incidents or threats of hijacking or sabotage against aircraft, airports or air navigation facilities occur, assist the other Party by facilitating communications intended to terminate such incidents rapidly and safely.

ARTICLE 8

Commercial Opportunities

(1) The airlines of one Party may establish offices in the territory of the other Party for the promotion and sale of air transportation.

(2) The designated airlines of one Party may, in accordance with the laws and regulations of the other Party relating to entry, residence and employment, bring in and maintain in the territory of the other Party managerial, sales, technical, operational and other specialist staff required for the provision of air transportation.

(3) Each designated airline may perform its own ground handling in the territory of the other Party ("self-handling") or, at its option, select among competing agents for such services. These rights shall be subject only to physical constraints resulting from considerations of airport safety. Where such considerations preclude self-handling, ground services shall be available on an equal

basis to all airlines; charges shall be based on the costs of services provided; and such services shall be comparable to the kind and quality of services if self-handling were possible.

(4) Each airline of one Party may engage in the sale of air transportation in the territory of the other Party directly and, at the airline's discretion, through its agents, except as may be specifically provided for the protection of the consumer by the regulations of the country in which the traffic originates. Each airline may sell such transportation, and any person shall be free to purchase such transportation, in the currency of that territory or in freely convertible currencies according to the laws and regulations of said Party.

(5) Each airline of one Party may convert and remit to its country, on demand, local revenues from the sale of such air transportation in excess of sums locally disbursed. Conversion and remittance shall be permitted promptly without restrictions or remittance taxation in respect thereof at the rate of exchange applicable to current transactions and remittance, and according to the national laws and regulations of each Party.

ARTICLE 9

Customs Duties and Taxes

(1) On arriving in the territory of one Party, aircraft operated in international air transportation by the designated airlines of the other Party, their regular equipment, ground equipment, fuel, lubricants, consumable technical supplies, spare parts including engines, aircraft stores (including but not limited to such items as food, beverages and liquor, tobacco and other products destined for sale to or use by passengers in limited quantities during

the flight), and other items intended for or used solely in connection with the operation or servicing of aircraft engaged in international air transportation shall be exempt, on the basis of reciprocity, from all import restrictions, property taxes and capital levies, customs duties, excise taxes, and similar fees and charges imposed by the national authorities, and not based on the cost of services provided, provided such equipment and supplies remain on board the aircraft.

(2) There shall also be exempt, on the basis of reciprocity, from the taxes, duties, fees and charges referred to in paragraph (1) of this Article, with the exception of charges based on the cost of the service provided:

(a) aircraft stores introduced into or supplied in the territory of a Party and taken on board, within reasonable limits, for use on outbound aircraft of a designated airline of the other Party engaged in international air transportation, even when these stores are to be used on a part of the journey performed over the territory of the Party in which they are taken on board:

(b) ground equipment and spare parts including engines introduced into the territory of a Party for the servicing, maintenance or repair of aircraft of a designated airline of the other Party used in international air transportation; and

(c) fuel, lubricants and consumable technical supplies introduced into or supplied in the territory of a Party for use in an aircraft of a designated airline of the other Party engaged in international air transportation, even when these supplies are to be used on a part of the journey performed over the territory of the Party in which they are taken on board.

(3) Equipment and supplies referred to in paragraphs (1) and (2) of this Article may be required to be kept under the supervision or control of the appropriate authorities.

(4) The exemptions provided for by this Article shall also be available where the designated airlines of one Party have contracted with another airline, which similarly enjoys such exemptions from the other Party, for the loan or transfer in the territory of the other Party of the items specified in paragraphs (1) and (2) of this Article.

(5) Each Party shall use its best efforts to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities on the items specified in paragraphs (1) and (2) of this Article, as well as from fuel through-put charges, in the circumstances described in this Article, except to the extent that the charges are based on the actual cost of providing the service.

ARTICLE 10

User Charges

(1) User charges imposed by the competent charging authorities on the airlines of the other Party shall be just, reasonable, and non-discriminatory.

(2) User charges imposed on the airlines of the other Party may reflect, but shall not exceed, an equitable portion of the full economic cost to the competent charging authorities of providing the airport, air navigation, and aviation security facilities and services. Facilities and services for which charges are made shall be provided on an efficient and economic basis. Reasonable notice shall be

given prior to changes in user charges. Each Party shall encourage consultations between the competent charging authorities in its territory and airlines using the services and facilities, and shall encourage the competent charging authorities and the airlines to exchange such information as may be necessary to permit an accurate review of the reasonableness of the charges.

ARTICLE 11

Fair Competition

(1) Each Party shall allow a fair and equal opportunity for the designated airlines of both Parties to compete in the international air transportation covered by this Agreement.

(2) Each Party shall take all appropriate action within its jurisdiction to eliminate all forms of discrimination or unfair competition practices adversely affecting the competitive position of the airlines of either Party.

(3) Neither Party shall unilaterally limit the volume of traffic, frequency or regularity of service, or the aircraft type or types operated by the designated airlines of the other Party, except as may be required for customs, technical, operational or environmental reasons under uniform conditions consistent with Article 15 of the Convention.

(4) Neither Party shall impose on the other Party's designated airlines a first refusal requirement, uplift ratio, no-objection fee, or any other requirement with respect to the capacity, frequency or traffic which would be inconsistent with the purposes of this Agreement.

(5) Neither Party shall require the filing of schedules, programs for charter flights, or operational plans by

airlines of the other Party for approval, except as may be required on a non-discriminatory basis to enforce uniform conditions as foreseen by paragraph (3) of this Article or as may be specifically authorized in an Annex to this Agreement. If a Party requires filings for information purposes, it shall minimize the administrative burdens of filing requirements and procedures on air transportation intermediaries and on designated airlines of the other Party.

ARTICLE 12

Pricing (Mutual Disapproval)

(1) Each Party shall allow prices for air transportation to be established by each designated airline based upon commercial considerations in the marketplace. Intervention by the Parties shall be limited to:

(a) prevention of predatory or discriminatory prices or practices;

(b) protection of consumers from prices that are unduly high or restrictive because of the abuse of a dominant position; and

(c) protection of airlines from prices that are artificially low because of direct or indirect governmental subsidy or support.

(2) Each Party may require notification to or filing with its aeronautical authorities of prices proposed to be charged to or from its territory by airlines of the other Party. Notification or filing by the airlines of both Parties may be required no more than 60 days before the proposed date of effectiveness. In individual cases, notification or filing may be permitted on shorter notice than normally required. Neither Party shall require the notifi-

cation or filing by airlines of the other Party of prices charged by charterers to the public for traffic originating in the territory of the other Party.

(3) Neither Party shall take unilateral action to prevent the inauguration or continuation of a price proposed to be charged or charged by (a) an airline of either Party for international air transportation between the territories of the Parties, or (b) an airline of one Party for international air transportation between the territory of the other Party and any other country, including in both cases transportation on an interline or intra-line basis. If either Party believes that any such price is inconsistent with the considerations set forth in paragraph (a) of this Article, it shall request consultations and notify the other Party of the reasons for its dissatisfaction as soon as possible. These consultations shall be held not later than 30 days after receipt of the request, and the Parties shall cooperate in securing information necessary for reasoned resolution of the issue. If the Parties reach agreement with respect to a price for which a notice of dissatisfaction has been given, each Party shall use its best efforts to put that agreement into effect. Without mutual agreement, that price shall go into or continue in effect.

(4) Notwithstanding paragraph (3) of this Article, each Party shall allow (a) any airline of either Party or any airline of a third country to meet a lower or more competitive price proposed or charged by any other airline or charterer for international air transportation between the territories of the Parties, and (b) any airline of one Party to meet a lower or more competitive price proposed or charged by any other airline or charterer for international air transportation between the territory of the other Party and a third country. As used herein, the term "meet" means the right to establish on a timely

basis, using such expedited procedures as may be necessary, an identical or similar price on a direct, interline or intra-line basis, notwithstanding differences in conditions relating to routing, roundtrip requirements, connections, type of service or aircraft type or such price through a combination of prices.

ARTICLE 13

Consultations

Either Party may, at any time, request consultations relating to this Agreement. Such consultations shall begin at the earliest possible date, but not later than 60 days from the date the other Party receives the request unless otherwise agr :d. Each Party shall prepare and present during such consultations relevant evidence in support of its position in order to facilitate informed, rational and economic decisions.

If there are any changes or revisions in this Agreement or its Annexes as a result of such consultations, they shall be confirmed by diplomatic note.

ARTICLE 14

Settlement of Disputes

(1) Any dispute arising under this Agreement which is not resolved by a first round of formal consultations, except those which may arise under paragraph 3 of Article 12 (Pricing), may be referred by agreement of the Parties for decision to some person or body. If the Parties do not so agree, the dispute shall at the request of either Party be submitted to arbitration in accordance with the procedures set forth below.

(2) Arbitration shall be by a tribunal of three arbitrators to be constituted as follows:

(a) within 30 days after the receipt of a request for arbitration, each Party shall name one arbitrator. Within 60 days after these two arbitrators have been named, they shall by agreement appoint a third arbitrator, who shall act as President of the arbitral tribunal;

(b) if either Party fails to name an arbitrator, or if the third arbitrator is not appointed in accordance with subparagraph (a) of this paragraph, either Party may request the President of the International Court of Justice to appoint the necessary arbitrator or arbitrators within 30 days. If the President is of the same nationality as one of the Parties, the most senior Vice President who is not disqualified on that ground shall make the appointment.

(3) Except as otherwise agreed, the arbitral tribunal shall determine the limits of its jurisdiction in accordance with this Agreement and shall establish its own procedure. At the direction of the tribunal or at the request of either of the Parties, a conference to determine the precise issues to be arbitrated and the specific procedures to be followed shall be held no later than 15 days after the tribunal is fully constituted.

(4) Except as otherwise agreed, each Party shall submit a memorandum within 45 days of the time the tribunal is fully constituted. Replies shall be due 60 days after the presentation of the Memorandum. The tribunal shall hold a hearing at the request of either Party or at its discretion within 15 days after the date of filing of the responses.

(5) The tribunal shall attempt to render a written decision within 30 days after completion of the hearing or, if no hearing is held, after the date both replies are submitted, whichever is sooner. The decision of the majority of the tribunal shall prevail.

(6) The Parties may submit requests for clarification of the decision within 15 days after it is rendered and any clarification given shall be issued within 15 days of such request.

(7) Each Party shall, consistent with its national law, give full effect to any decision or award of the arbitral tribunal.

(8) The expenses of the arbitral tribunal, including the fees and expenses of the arbitrators, shall be shared equally by the Parties. Any expenses incurred by the President of the International Court of Justice in connection with the procedures of paragraph (2)(b) of this Article shall be considered to be part of the expenses of the arbitral tribunal.

ARTICLE 15

Termination

Either Party may, at any given time give notice in writing through diplomatic channels to the other Party of its decision to terminate this Agreement. Such notice shall be sent simultaneously to the International Civil Aviation Organization. This Agreement shall terminate at midnight (at the place of receipt of notice to the other Party) immediately before the first anniversary of the date of receipt of the notice by the other Party, unless the notice is withdrawn by agreement before the end of this period.

ARTICLE 16

Multilateral Agreement

If a multilateral agreement, accepted by both Parties, concerning any matter covered by this Agreement enters

into force, this Agreement shall be amended so as to conform with the provisions of the multilateral agreement.

ARTICLE 17

Registration with ICAO

This Agreement and all amendments thereto shall be registered with the International Civil Aviation Organization.

ARTICLE 18

Entry into Force

This Agreement shall enter into force upon receipt of notification from the Government of El Salvador that its ratification process has been completed.

In witness whereof, the undersigned, being duly authorized by their respective Governments, have signed the present Agreement.

Done in duplicate at Washington, D.C., in the English and Spanish languages, both texts being equally authentic, this Second day of April, Nineteen Hundred and Eighty-two.

/s/ Thomas O. Enders
For the Government of
The United States of
America

/s/ Dr. Ernesto Rivas-Gallont
For the Government of
El Salvador

ANNEX I

Scheduled Air Service

Section 1

Airlines of one Party whose designation identifies this Annex shall, in accordance with the terms of their designation, be entitled to perform international air transportation (1) between points on the following routes, and (2) between points on such routes and points in third countries through points in the territory of the Party which has designated the airline.

A. *Routes for the airline or airlines designated by the Government of the United States*:

From the United States and its territories via intermediate points to points in El Salvador and beyond to points outside El Salvador.

B. *Routes for the airline or airlines designated by the Government of El Salvador*:

1. From El Salvador via Guatemala City, Guatemala, San Pedro Sula, Honduras, and Belize City, Belize to Miami.[1]

2. From El Salvador via Guatemala City, Guatemala, San Pedro Sula, Honduras, and Belize City,

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1. The intermediate point Guatemala City, Guatemala, may be served on this route for foreign air transportation of property and mail only.

Section 2

Belize to the coterminal points Houston and New Orleans.

3. From El Salvador to the coterminal points Los Angeles and San Francisco.

Each designated airline may, on any or all flights and at its option, operate flights in either or both directions and without directional or geographic limitation, serve points on the routes in any order, and omit stops at any point or points outside the territory of the Party which has designated that airline, without loss of any right to carry traffic otherwise permissible under this Agreement.

Section 3

On any international segment or segments of the routes described in Section 1 above, a designated airline may perform international air transportation without any limitation as to change, at any point on the route, in flight number and type of aircraft operated, provided that in the outbound direction the transportation beyond such point is a continuation of the transportation from the territory of the Party which has designated the airline and, in the inbound direction, the transportation to the territory of the Party which has designated the airline is a continuation of the transportation beyond such point.

ANNEX II

Charter Air Service

Section 1

Airlines of one Party whose designation identifies this Annex shall, in accordance with the terms of their designation, be entitled to perform international air transportation to, from and through any point or points in the territory of the other Party, either directly or with stopovers en route, for one-way or roundtrip carriage of the following traffic:

(a) any traffic to or from a point or points in the territory of the Party which has designated the airline;

(b) any traffic to or from a point or points beyond the territory of the Party which has designated the airline and carried between the territory of that Party and such beyond point or points (i) in transportation other than under this Annex; or (ii) in transportation under this Annex with the traffic making a stopover of at least two consecutive nights in the territory of that Party.

Section 2

With regard to traffic originating in the territory of either Party, each airline performing air transportation under this Annex shall comply with such laws, regulations and rules of the Party in whose territory the traffic originates, whether on a one-way or roundtrip basis, as that Party now or hereafter specifies shall be applicable to such transportation. In addition, designated airlines of one Party may also operate charters with traffic originating in the territory of the other Party in compliance with the

laws, regulations and rules of the first Party. When such regulations or rules of one Party apply more restrictive terms, conditions or limitations to one or more of its airlines, the designated airlines of the other Party shall be subject to the least restrictive of such terms, conditions or limitations. Moreover, if the aeronautical authorities of either Party promulgate regulations or rules which apply different conditions to different countries, each Party shall apply the least restrictive regulation or rule to the designated airlines of the other Party.

Section 3

Neither Party shall require a designated airline of the other Party, in respect of the carriage of traffic from the territory of that other Party on a one-way or roundtrip basis, to submit more than a declaration of conformity with the laws, regulations and rules of that other Party referred to under Section 2 of this Annex or of a waiver of these regulations or rules granted by the aeronautical authorities of that other Party.

Dear Mr. Enders:

With regard to the Air Transport Agreement signed this date between the Republic of El Salvador and the United States of America, I wish to note that the Government of El Salvador reserves the right to apply for authorization for intermediate rights via Guatemala City, Guatemala, on El Salvador Route 3 of Annex I of the Agreement.

Sincerely,

/s/ Dr. Ernesto Rivas-Gallont
Dr. Ernesto Rivas-Gallont
Ambassador

The Republic of El Salvador

The Honorable

Thomas O. Enders,
Assistant Secretary,

Bureau of Inter-American Affairs,
Department of State
Washington, D.C.

Dear Mr. Ambassador:

I refer to your letter of this date concerning the Air Transport Agreement between the United States of America and the Republic of El Salvador. I hereby acknowledge that the Government of El Salvador reserves the right to apply for authorization for intermediate rights via Guatemala City, Guatemala, on El Salvador Route 3 of Annex I of the Agreement.

Sincerely,

/s/ Thomas O. Enders
Thomas O. Enders
Assistant Secretary

Bureau of Inter-American Affairs
Department of State

His Excellency

Dr. Ernesto Rivas-Gallont,
Ambassador,

Embassy of El Salvador,
Washington, D.C.

Railway Labor Act

Section 2, First of the Act, 45 U.S.C. § 152, First, states that carriers and employees should:

> exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes. . . .

Section 2, Seventh, 45 U.S.C. § 152, Seventh states that the parties may not "change the rates of pay, rules or working conditions . . . except in the manner prescribed in such [collective bargaining] agreements or in Section 6 of the Act".

Section 5, First, 45 U.S.C. § 155, First, provides that until 30 days after the National Mediation Board certifies its efforts have failed and arbitration has been rejected, "no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose".

Section 6, 45 U.S.C. § 156 provides:

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered

its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 84-3036

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
AFL-CIO,
Plaintiff-Appellee,

vs.

TACA INTERNATIONAL AIRLINES, S.A.,
Defendant-Appellant.

Appeal From the United States District Court
for the Eastern District of Louisiana

AMICUS CURIAE BRIEF OF THE REPUBLIC OF EL SALVADOR

John J. Mullenholz
Stephen Carlton
NEILL, MULLENHOLZ, SHAW
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Telephone: (202) 463-8400

[-i-]*

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AFL/CIO, Plaintiff,	)	
v.	)	No. 84-3036
TACA INTERNATIONAL AIRLINES, S.A., Defendant.	)	

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that Judges of this Court may evaluate possible disqualification or recusal.

1. Air Line Pilots Association, International; AFL-CIO ("ALPA").

2. TACA International Airlines, S.A. ("TACA").

3. The pilots employed by TACA and represented by ALPA.

4. The following counsel have appeared in this matter:

For ALPA: Cohen, Weiss and Simon (Stephen B. Moldof, Keith Secular, Ann O'Shea)

Barker, Boudreaux, Lamy, Gardner & Foley (Robert H. Urann)

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*Printer's Note: Numbers in brackets represent the original page numbers.

For TACA: Fleming and Huck (Joseph Z. Fleming) Partee & Waldrip (John B. Waldrip)

Other than the parties listed herein Counsel for the Republic of El Salvador is unaware of additional parties that may have an interest in the outcome of this case.

/s/ John Mullenholz
John J. Mullenholz, Esq.
NEILL, MULLENHOLZ, SHAW & SEEGER
Counsel for the Republic of El Salvador

STATEMENT REGARDING ORAL ARGUMENT

The Republic of El Salvador understands that there will be oral argument in this matter. However, the Republic of El Salvador desires solely to submit and rely on its *Amicus Curiae* Brief.

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*Printer's Note: Page numbers represent the original pages.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked in connection with this appeal pursuant to 28 U.S.C. § 1291. The Republic of El Salvador is submitting its amicus curiae Brief to assist the Court yet by this act is not submitting to the jurisdiction of the Court.

* * *

STATEMENT OF THE ISSUES

1. Whether the United States District Court for the Eastern District of Louisiana (the "District Court") erred in concluding that the interests of the Republic of El Salvador in exercising prescriptive and enforcement jurisdiction over TACA International Airlines, S.A. ("TACA") were outweighed by the interests of the United States in exercising prescriptive and enforcement jurisdiction over TACA as party to a collective bargaining agreement with the Air Line Pilots Association ("ALPA") under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*

2. Whether the Act of State doctrine, which requires that proper actions undertaken by the sovereign Republic of El Salvador pursuant to its public interest not be denied effect by courts of the United States of America, is applicable here so as to bar the District Court from invalidating Article 110 of the Constitution of the Republic of El Salvador.

3. Whether the District Court erred in failing to observe Article 14 of the Air Transport Agreement between the Governments of El Salvador and the United States requiring that any dispute concerning the Agreement be settled by international arbitration.

4. Whether principles of international comity prohibit the courts of the United States from compelling TACA International Airlines, S.A. to violate the Salvadoran national Constitution.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below.

On December 16, 1983 the Constituent Assembly of the Republic of El Salvador enacted a new Constitution for the Republic, effective on December 20, 1983. Article 110 of the Constitution provides in pertinent part, that Salvadoran public service enterprises shall have their work centers and bases of operation in El Salvador. By letter dated December 22, 1983, the Ministry of Labor and Social Welfare of the Republic of El Salvador, acting pursuant to Article 110, ordered TACA International Airlines, S.A., ("TACA") to transfer its pilots' base from New Orleans to El Salvador effective December 23, 1983.

On December 29, 1983 the Air Line Pilots Association, ("ALPA"), filed suit in the United States District Court for the Eastern District of Louisiana seeking a temporary restraining order preventing TACA from removing its pilot or line operations to El Salvador. The District Court issued the temporary order and on January 6, 1984 the District Court heard arguments on a motion for preliminary and permanent injunction by ALPA. The Court issued the requested preliminary and permanent injunction, and ordered TACA not to relocate the pilots' base to El Salvador.

B. Statement of Facts.

The following facts, for the most part, are a matter of public record. To some extent they have been established in the record in the Court below. They are stated in order to give this Court a clear understanding of the position of the Government of the [- 4 -] Republic of El Salvador in this matter.

For the past several years El Salvador has been undergoing significant political, economic and social changes. A critical step in this metamorphosis was the internationally acclaimed election of a Constituent Assembly in March 1982. The primary mission of these elected officials, who spanned the entire political spectrum in El Salvador, was to develop and ratify a national Constitution which would be the foundation of a strong democracy.

The Constituent Assembly consumed over 18 months in carrying out its task and the Constitution was adopted in December 6, 1983. An important provision of the Constitution is found in Article 110 which requires that the Salvadoran public service companies have their working center and base of operations in El Salvador.

In parts of El Salvador there is a condition of civil strife which has been created by forces seeking the overthrow of the freely elected government of the country. These forces are supported, indeed controlled, by foreign governments.

Under these circumstances, the Republic of El Salvador has determined that the base of operations of TACA its largest and most modern air carrier must be located in its home country. All ministerial actions enforcing that determination flow from the mandate in Article 110 of the Constitution. There is no suggestion of an arbitrary or capricious act. Rather, the will of the elected legislative body of the citizens of the country is the controlling mechanism.

[- 5 -]

SUMMARY OF ARGUMENT

The District Court improperly enjoined the designated international air carrier of the Republic of El Salvador

from complying with Article 110 of the Constitution of that country, which requires that TACA move its pilots' base from the United States to El Salvador.

The decision of the District Court should be reversed for the following reasons:

I. The Republic of El Salvador in the exercise of its jurisdiction over its designated international air carrier, TACA International Airlines, S.A., a Salvadoran corporation, as required by Article 110 of its national Constitution has directed that TACA return its base of operation to El Salvador. The United States of America through the District Court has exercised jurisdiction over TACA on the basis of the collective bargaining agreement between the Air Line Pilots Association ("ALPA") and TACA pursuant to the Railway Labor Act, 45 U.S.C. § 151 *et seq.* Although concurrent jurisdiction is claimed by both governments, United States law requires moderation of U.S. enforcement jurisdiction since the interests of the foreign sovereign greatly outweigh those of the United States.

II. The act of state doctrine restrains the courts of the United States of America from sitting in judgment over valid actions undertaken by the sovereign Republic of El Salvador pursuant to its public interest.

[- 6 -] III. Article 14 of the Air Transport Agreement between the Government of El Salvador and the Government of the United States of America requires that any dispute concerning the Agreement be settled by international arbitration. This exclusive resolution mechanism implicitly extends to questions concerning the interpretation of the Agreement and its scope. Notwithstanding the inherent authority of federal courts to interpret treaties as domestic law, the District Court's conclusion that this dispute did not arise under the Air Transport Agreement

was in error, and if not reversed, would contravene that Agreement and constitute a violation of international law.

IV. Principles of international comity require that United States courts not compel TACA to violate Salvadoran law. Violation of Salvadoran law in this case would threaten the vital national interests of the Republic of El Salvador.

ARGUMENT

I.

THE BALANCE OF INTERESTS FAVORS DEFERENCE TO THE CONSTITUTION OF THE REPUBLIC OF EL SALVADOR

As a sovereign nation, the Republic of El Salvador retains prescriptive and enforcement jurisdiction over its nationals. A corporation has the nationality of the state which creates it. *Restatement (2d) of the Law of Foreign Relations* § 527 (1965) (hereinafter cited as "*Restatement* (2d)"). TACA is a Salvadoran corporation and its aircraft are registered by the Gover ment of the Republic of El Salvador. U.S. law recognizes that a sovereign [- 7 -] government may exercise jurisdiction over its corporate citizens even though the activities of those citizens take place outside the boundaries of that sovereign country. *Scotch Whiskey Association v. Barton Distilling Company*, 489 F.2d 809, 812 (7th Cir. 1973).

In like fashion the United States may exercise jurisdiction over a foreign based entity by virtue of its commercial activities in the United States. In this case, the United States has exercised its prescriptive and enforcement jurisdiction over TACA pursuant to the Railway Labor Act, 45 U.S.C. § 151 *et seq.* Thus, two distinct nation states re-

tain valid jurisdiction to prescribe laws affecting the Salvadoran corporation, TACA, and the directives of the two sovereigns require inconsistent conduct by TACA.

The United States, acting through its judicial branch, has required that TACA maintain its pilot base in New Orleans, Louisiana. The United States has claims jurisdiction to mandate such conduct by virtue of the provisions contained in the Railway Labor Act, *supra*. In contrast, the Republic of El Salvador demands that TACA remove its pilot base from New Orleans and relocate it within the territory of El Salvador under the authority of Article 110 of the national Constitution.[1] El Salvador's jurisdiction flows from the Salvadoran nationality of TACA. This conflict in the conduct required of TACA must be resolved in favor of the laws of one sovereign state or the other.

[- 8 -] When the laws of the United States and a foreign country conflict to such an extent that an order by a U.S. court enforcing U.S. law would subject the party to sanctions in the foreign country, the U.S. court must engage in a balancing approach in order to "[accommodate] the principles of the law of the forum with concepts of due process and international comity." *Arthur Anderson & Co. v. Finesilver*, 546 F.2d 338, 341 (10th Cir. 1976), *cert. denied* 429 U.S. 1096 (1977). This Court, in applying this balancing approach, has stated that "courts and legislatures should take every reasonable precaution to avoid placing individuals in the situation [where they must violate the legal commands of their country of residence]." *In re Grand Jury Proceedings*, 532 F.2d 404, 410 (5th Cir. 1976).

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1. Article 110 provides in pertinent part:

"[S]alvadoran public service enterprises shall have their work centers and bases of operation in El Salvador."

Constitucion (Constitution) article 10, par. 4 (El Sal.)

In determining whether to moderate the exercise of its enforcement jurisdiction, a court must balance five distinct factors: (i) vital national interests of each of the states; (ii) the extent and nature of the hardships that inconsistent enforcement actions would impose upon the person (corporation); (iii) the extent to which the required conduct is to take place in the territory of the other state; (iv) the nationality of the person (corporation); and (v) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state. *Restatement* (2d) §§ 39, 40; *see also Restatement* (2d) § 30 Comment c. U.S. courts have uniformly weighed the factors set forth in the Restatements. *See United States v. Vetco, Inc.*, 691 F.2d 1281, 1288 [- 9 -] (9th Cir. 1981) *cert. denied* 102 S. Ct. 671 (1981); *Westinghouse Electric Corp. Uranium Contract Litigation*, 563 F.2d 992, 997 (10th Cir. 1977); *In re Grand Jury Proceedings*, 532 F.2d 404, 407 (5th Cir. 1976).

(a) Vital national interests

The United States, as a sovereign, retains little overriding interest in the permanent maintenance of the TACA pilot base in New Orleans. The District Court cited the interest of the United States in enforcing the validity of the collective bargaining agreement. As the District Court reasoned, the collective bargaining agreement was an expression of the national economic policy of the United States. The only other interests cited by the District Court concerned the economic interests of the TACA pilots, less than one-half of whom are United States citizens. None of these interests can be characterized properly as vital to the United States in comparison with those interests maintained by the Republic of El Salvador.

"Vital national interest means an interest such as national security or general welfare to which a state at-

taches overriding importance." *Restatement* (2d) § 40 Comment b. The Republic of El Salvador recently enacted a new Constitution to guide its people toward economic growth and democratic progress. One of the most important concerns in the state of civil unrest existing in the Republic of El Salvador is the security, integrity and reliability of the national transportation system. A properly functioning international air carrier is a vital component of this system. From the dual perspectives of economic vitality [- 10 -] and potential military necessity, the security and reliability of the transportation system is paramount.

TACA is the largest carrier in El Salvador and the only carrier with modern, reliable equipment. From the perspective of the Republic of El Salvador when it adopted Article 110 of its Constitution, the maintenance of TACA's pilot base within El Salvador is indispensable to the future security and reliability of the Republic's international air carrier. The Constituent Assembly of the Republic of El Salvador, concerned with the welfare of its people, recognized this fact when it passed Article 110. The vital national interests of the Republic of El Salvador—the growth and security of its economy—greatly outweigh those of the United States in this case. This court should take into account the strong concern expressed by the Republic of El Salvador which has been expressed to both the Executive branch by means of a diplomatic note, and the judicial branch by submission of this amicus curiae brief. The requested deference to Salvadoran law should be accorded significant weight by this court.

b. The extent and nature of the hardship imposed upon the Corporation by inconsistent enforcement actions.

TACA potentially faces much harsher consequences in the Republic of El Salvador should it refuse to move its pilot base from New Orleans. As a legal entity recognized and licensed by the Republic of El Salvador, TACA relies on the sovereign for its continued existence. Although the Republic of El Salvador does not represent what actions it may or may not take against TACA if it refuses to act in accordance with Article 110 of the [- 11 -] national Constitution, the potential hardship is greater than that posed by a failure to abide by the order of the lower court. Willful failure to comply with the constitutional mandate of Article 110 could result in TACA losing its designation to operate as El Salvador's international air carrier. Similarly, TACA could lose its air carrier license.

TACA's willful failure or refusal to comply with the collective bargaining dispute resolution mechanisms contained in 45 U.S.C. § 152 would constitute a misdemeanor under United States domestic law. 45 U.S.C. § 152 Tenth. While this enforcement mechanism is strong, nonetheless it does not create as strong an expectation of compliance as the mandate contained in Article 110 of the Constitution of the Republic of El Salvador. The enforcement mechanism contained in 45 U.S.C. § 152 Tenth poses no real threat to the continued existence of TACA as a Salvadoran corporate entity or as the licensed, designated international air carrier of the Republic of El Salvador. This factor favors application of Salvadoran law since the potential hardship to TACA is greater if it chooses to disobey Salvadoran law.

Literal adherence to the domestic law of the United States would be unpragmatic and unreasonable under the present circumstances. Deference to Salvadoran law is therefore justified.

c. The extent to which the required conduct is to take place in the territory of the other state.

Action required of TACA by Article 110 of the national Constitution of the Republic of El Salvador and by Order of the Ministry of Labor and Social Welfare (Defendant's Exhibit 4, [- 12 -] Record from District Court) necessarily involves an indirect extraterritorial effect. This court should consider however that TACA's contacts in the United States are minor in comparison with its overwhelming Salvadoran character. TACA serves many countries in Central America. It operates aircraft registered under the flag of the Republic of El Salvador. More than a majority of its pilots are Salvadorian nationals. TACA's contact with the United States occurs at the various airports designated under the Air Transport Agreement. The corporation does not fly domestic routes within the United States. All flight contacts within United States territory serve solely as either the embarcation or destination point for international flights to and from the territory of El Salvador and other Central American countries. TACA's contacts with the United States are those minimally necessary to operate as El Salvador's designated international air carrier under the Agreement. Action demanded by the United States requires extraterritorial action by TACA in the form of a refusal to comply with the directives of its government. It also has the effect of denying a foreign sovereign the ability to control one of its nationals. While TACA may be required to act or refrain from acting in the United States, this factor is of slight importance in relation to the overriding public interests of the Republic of El Salvador in exercising its ability to regulate its sole international air carrier.

Finally, TACA's compliance with the Salvadoran constitutional mandate would have a direct, foreseeable and

substantial impact [- 13 -] in El Salvador. *See Restatement* Tent. Draft No. 2 § 403(2)(a). By re-establishing TACA's pilot base in El Salvador, the sovereign would guarantee the availability and reliability of its major air carrier. In this period of civil unrest and economic development, establishment of TACA's pilot base in El Salvador is vital to the public interest of the people of El Salvador.

d. Nationality of the person

TACA is the only legal entity involved in this appeal that is required to act in an inconsistent manner by two different sovereign nation states. TACA's status as a legal rather than natural person requires consideration of its nationality in the balancing of interests between the two sovereigns. *Restatement* (2d) § 40 Comment d. The interests of the Republic of El Salvador obviously are great where, as here, it has asserted jurisdiction over one of its nationals. The United States retains no such inherent interest regarding TACA since the corporation is a Salvadoran entity. The nationality of TACA International Airlines, S.A. favors deference to Salvadoran law.

e. The extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

As discussed earlier, refusal to comply with the provisions of Article 110 of the national Constitution potentially could result in revocation of the license granted to TACA, or even more serious actions. The potential adverse consequences to TACA are great if it refuses to comply with the constitutional requirement of the sovereign that licensed it and recognized its corporate existence. The continued existence of TACA is not [- 14 -] threatened by the enforcement mechanisms of the Railway Labor

Act under 45 U.S.C. § 152 Tenth; therefore the interests of the Republic of El Salvador greatly outweigh those of the United States of America.

The balance of all interests involved herein greatly favor deference to Salvadoran law. The Republic of El Salvador enacted Article 110 with a vital national interest in mind; preservation of the security, integrity and reliability of its transportation system, particularly its major international air carrier. No such vital national interest of the United States of America rises to the level of those inherent in the enactment of Article 110 of the Constitution of the Republic of El Salvador. United States law therefore favors deference to the provisions of the Salvadoran Constitution.

II.

THE ACT OF STATE DOCTRINE REQUIRES THAT RECOGNITION BE GIVEN TO THE PROVISIONS OF ARTICLE 110 OF THE CONSTITUTION OF THE REPUBLIC OF EL SALVADOR

The act of state doctrine is a federal conflicts of law rule. The doctrine is neither compelled by international law, *Restatement* § 41 Comment a, nor required by the Constitution of the United States. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 393, 421-424 (1964). It does, however, rest on constitutional underpinnings that arise out of the separation of powers between the executive and judicial branches required under the Constitution of the United States. *Id.* at 423.

[- 15 -] The act of state doctrine forcefully emerged in American jurisprudence in the early nineteenth century. The basic concept underlying the doctrine was succinctly stated by Chief Justice Fuller in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

The doctrine "precludes the courts of this country from inquiring into the validity of the public acts of a recognized sovereign power committed within its territory." *Sabbatino*, 376 U.S. at 401. To allow domestic courts to pass on the validity of foreign acts of state could hinder the conduct of foreign relations by the executive branch pursuant to Article 2 of the Constitution.

Thus, three prerequisites exist for application of the doctrine: (i) that the act be a public action; (ii) that it be committed by a recognized foreign power;[2] and (iii) that the act be committed by the sovereign within its own territory. All three prerequisites are met in this case.

[- 16 -] It is unquestioned that the adoption by the Constituent Assembly of the Constitution supplied the requisite "public act." Indeed, the election of the members of the Assembly and their activities, including the adoption of the Constitution have been the subject of worldwide scrutiny. This is not the case of an executive fiat or decree. Moreover there are obvious overriding state concerns which initiated this action.

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2. A private litigant, such as TACA, may raise the act of state doctrine as a defense, even when no sovereign state is a party to the action. All that is required is that the private parties be affected by the action of the foreign sovereign. *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.*, 560 F. Supp. 1372, 1381 (D. Del. 1983); *Intern. Ass'n. of Machinists, Etc. v. OPEC*, 649 F.2d 1354, 1359 (9th Cir. 1981).

The District Court erred in characterizing the acts performed by the Republic of El Salvador in promulgating Article 110 of its Constitution as "commercial" in nature and thus, not entitled to judicial deference. In *Alfred Dunhill of London, Inc. v. Cuba,* 425 U.S. 682, 698 (1976), the Supreme Court established a commercial activity exception to the act of state doctrine, holding that United States courts would decline to extend the doctrine to purely commercial activities of a sovereign. It has been recognized that *Dunhill* "turned on the absence of any 'statute, decree, order, or resolution of the Cuban government itself' approving of or authorizing the challenged act in holding that the act of state doctrine did not apply to purely commercial activities . . . ." *DeRoburt v. Gannet Co., Inc.*, 548 F. Supp. 1370 (D. Hawaii 1982). *See also Dominicus Americana Bohio v. Gulf & Western,* 473 F. Supp. 680, 689-90 (S.D.N.Y. 1979); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, *cert. denied* 434 U.S. 984 (1978) (2d Cir. 1977). Thus, in *Hunt,* the Second Circuit held that the act complained of, the expropriation of property located in Libya by the President of Libya, was clearly within the act of state doctrine because the act was intended as a political reprisal [- 17 -] against the United States and was not done for purely commercial reasons.

To state the point another way, acts which involve the public interest of a nation as a state will fall within the scope of the act of state doctrine. *Restatement,* § 41, Comment d. In promulgating Article 110 of its Constitution, the Republic of El Salvador was acting in its sovereign capacity to regulate Salvadoran business enterprises and to ensure the security and reliability of its public transportation system. The government of El Salvador holds no ownership interest in TACA and receives no direct monetary benefit in requiring TACA, along with other Sal-

vadoran public service companies, to locate all bases of operation within the territory of El Salvador. The inclusion of Article 110 of the Constitution by the Republic of El Salvador is solely in the public interest of the Republic of El Salvador and the District Court's characterization to the contrary was simply erroneous.

It is undisputed that the United States of America recognizes the Republic of El Salvador as a sovereign foreign power and that Article 110 of its Constitution was promulgated by the Constituent Assembly, the highest legislative authority in the Republic of El Salvador, acting in its official capacity. Thus, the second prerequisite of *Sabbatino* is met here.

The third condition for application of the act of state doctrine is that the foreign sovereign's act take place within its own territory. The District Court erred in concluding that the act of the Republic of El Salvador requiring its public [- 18 -] service companies to base their operations in El Salvador, did not come to complete fruition within the dominion of El Salvador. It committed further error in holding that to apply the act of state doctrine would be tantamount to giving confiscatory effect to the laws of a foreign nation when applied here in the United States. The District Court, in effect, has challenged the sovereign power of the Republic of El Salvador to regulate its public service industries and to ensure its national security. Essentially, the lower court has emasculated Article 110 of the Constitution of the Republic of El Salvador with respect to any Salvadoran public service company which does business in the United States.

As noted above, *Sabbatino* requires that the act of the foreign sovereign be committed within its own territory. While the act of state doctrine applies to acts affecting

property, contracts, rights or persons within the territorial dominion of the acting state, an act of state can, and sometimes does, have a legitimate effect outside the territorial domain of the acting state. Indeed, if the act of the foreign state were strictly internal with no extra-territorial impact, there would be little need for consideration by a U.S. Court.

This notion was recognized in *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena,* 293 F. Supp. 892, 910-911 (D.N.Y. 1968), *mod. on other grounds,* 433 F.2d 686 (2d Cir. 1970), *cert. denied,* 403 U.S. 905 (1970), wherein the court stated:

> [- 19 -] One of the fundamental conditions of the 'act of state' doctrine is that the foreign state whose act is involved have a clearly recognizable jurisdictional basis for its action, usually one based on the territorial control over the subject of its action. Repeatedly our Supreme Court in reaffirming the doctrine has expressly referred to it as relating to the acts of a foreign sovereign 'within its own territory' . . . However, the mere fact that the foreign state's act, in addition to regulating matters within its territorial jurisdiction, may have some indirect impact outside its territory, does not preclude our treatment of it as an 'act of state'.

In requiring that TACA relocate its operational base, the Republic of El Salvador had a "clearly recognizable jurisdictional basis . . . based on territorial control over the subject of its action." *Id.* By virtue of the Salvadoran nationality of TACA and the authorizations granted by the Republic of El Salvador to enable TACA to operate as an air carrier, the Republic of El Salvador clearly retained jurisdiction to control the conduct of that air carrier. *Restatement* (2d) §§ 27, 29, 30(1)(a). Promulgation of the

Salvadoran constitutional provisions was accomplished entirely within the territorial confines of the Republic of El Salvador. The Republic of El Salvador has the power and authority to seek enforcement of its constitutional mandates in its own courts and can, if necessary, judicially compel TACA to comply with Article 110 of the Constitution. Thus, the act of state involved came to complete fruition within the dominion of the Salvadoran government and the fact that there is some impact outside of El Salvador does not remove that act from the aegis of the act of state doctrine.

The District Court erred in failing to distinguish between [- 20 -] sovereign acts that merely have an indirect extraterritorial effect, as does the mandate contained in Article 110 of the Constitution of the Republic of El Salvador, and sovereign acts that a state attempts to apply in an extraterritorial fashion. In the cases principally relied upon by the District Court, foreign states attempted to utilize United States courts to apply confiscatory property decrees in an extraterritorial fashion to property located in the United States. *Republic of Iraq v. First National City Bank*, 353 F.2d 47 (2d Cir. 1965), *cert. denied* 382 U.S. 1027 (1966) and *Maltina Corp. v. Cawy Bottling Company*, 462 F.2d 1021 (5th Cir. 1972). In contrast to those situations, however, the Republic of El Salvador has not taken, because it does not need to take, such steps to have Article 110 of its Constitution applied in an extraterritorial manner within the United States. Until now, the Republic of El Salvador has refrained from taking any action involving TACA's refusal to comply with Article 110 of the Constitution. It should be recognized, however, that if the courts of El Salvador order TACA to establish its pilot base in El Salvador, the United States courts would be required to counteract the Salvadoran order on an extra-

territorial basis. As the Fifth Circuit recognized in *Maltina Corp., supra*:

> The underlying thought expressed in all of the cases touching on the act of state doctrine is a common-sense one. It is that when a foreign government performs an act of state which is an accomplished fact, that is when it has the parties and the *res* before it and acts in such a manner as to change the relationship between the parties touching the *res*, it would be an affront to such foreign government for courts of the United States to hold that [- 21 -] such an act was a nullity. Furthermore, it is plain that the decisions took into consideration the realization that in most situations there was nothing the United States Courts could do about it in any event.

462 F.2d at 1027 *citing Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706 (5th Cir., 1968) *cert. denied*, 393 U.S. 924 (1968).

Another factor favoring invocation of the act of state doctrine is the balance of interests involved. *Sabbatino, supra* 376 U.S. at 428. Those interests tip decidedly in favor of deferring to the sovereign acts of El Salvador. *supra* p. 6.

Foreign policy considerations are also a key factor in this case and support application of the act of state doctrine. The ability of a sovereign state to control or to regulate the operations of its sole licensed international air carrier is an important attribute of its sovereignty. In ruling that El Salvador's designated international carrier must maintain its pilot base in New Orleans, Louisiana, the District Court implicitly denied that the Republic of El Salvador nas a right to impose basic obligations on its corporate nationals.

III.

JUDICIAL RESOLUTION OF A DISPUTE UNDER THE AIR TRANSPORT AGREEMENT VIOLATES THE TERMS OF THE AGREEMENT AND CONSTITUES A VIOLATION OF INTERNATIONAL LAW

On April 19, 1982 the Republic of El Salvador and the United States signed an Air Transport Agreement, T.I.A.S. No. 10488 ("Agreement"), pursuant to the Convention on International Civil Aviation, (the Chicago Convention), opened for signature, [- 22 -] December 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295, T.I.A.S. No. 1591 (ratified by the United States on August 9, 1946). Both countries are signatories to the Chicago Convention.

As an Executive Agreement, the Air Transport Agreement is effective as domestic law in the United States and supercedes inconsistent provisions of earlier acts of Congress. *Restatement* (Tent. Draft No. 2) §§ 141, 142. To the extent prior domestic legislation conflicts with the Agreement, the Agreement must control. *Id.*

Prior to the decision of the District Court, the Republic of El Salvador communicated to the United States its position that the Agreement allowed El Salvador to remove or to maintain its designated carrier in the exercise of its own sovereign judgment.[3]

Although not a party subject to the Court's jurisdiction in this case, the Republic of El Salvador nevertheless maintains that a dispute exists under the Agreement which must be settled by the arbitration provisions of Article 14. This dispute concerns whether the Republic of El Salvador may move its designated air carrier out of New Orleans

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3. Letter dated December 28, 1983 to Ambassador Pickering from Alejandro Gomez Video, Subsecretary of Foreign Affairs: TACA Record Excerpt Item 10.

in the exercise of its own discretion. This dispute must be resolved, albeit not by the judicial branch of the United States government. Under the terms of the Agreement *any* dispute between the parties is to be resolved by arbitration. Agreement, Article 14. Arbitration is the sole resolution mechanism. [- 23 -] While the District Court was required to interpret the terms of the Agreement in order to determine its own jurisdiction, its interpretation was erroneous and interfered with the conduct of foreign relations by the Executive, by denying the right to arbitration.

Although not expressed in the Agreement, it must be presumed that a major purpose underlying insertion of the international arbitration provisions into the Agreement was the avoidance of the current situation: interpretation of the Agreement by the judicial branch of either sovereign party.

A cornerstone of international law is that treaties must be honored; *pacta servanda sunt*. The Vienna Convention on the Law of Treaties May 23, 1969, Article 2 paragraph 1(a) provides that treaties under international law are to be respected and enforced by the nation states that are parties to them. This action of the District Court below overlooked this fundamental tenet of international law. The action of the District Court therefore should be reversed.

IV.

UNITED STATES COURTS SHOULD NOT COMPEL PARTIES TO VIOLATE FOREIGN LAW

Under principles of international comity, courts of the United States should not force a party to violate another nation's law. *See, e.g., Ghana Supply Commission*

v. New England Power Co., 83 F.R.D. 586 (D. Mass. 1979); *see also In re Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962); *Ings. v. Ferguson*, 282 F.2d 149 (2d Cir. 1960). In this case, adherence to the order of the [- 24 -] District Court requires TACA to violate the national Constitution of its country. Such a result should be avoided if at all possible.

From the viewpoint of the Republic of El Salvador, compliance with the provisions of its national Constitution is not merely desirable. Rather, such compliance is essential and necessary to the continued reliability of its public air transportation. This reliability factor stretches beyond concerns of economic policy to reach the area of national security. The Republic of El Salvador's need for reliable air transport is paramount at this point in its history. It is respectfully suggested that these concerns transcend the economic interests sought to be protected under the Railway Labor Act. A compelled violation of the Salvadoran Constitution would interfere with El Salvador's ability to control its designated air carrier and its ability to act in protecting the vital national interests of its citizenry, including reliable transportation for civilian and potentially military uses.

CONCLUSION

International and domestic law as shown above require reversal of the order of the District Court. The Republic of El Salvador requests that this Court reverse the lower of the court with instructions to dismiss the case.

Respectfully submitted,

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I HEREBY CERTIFY that copies of the foregoing AMICUS CURIAE BRIEF OF THE REPUBLIC OF EL SALVADOR have been sent this 7th day of June 1984 by courier to the below-listed parties at their respective addresses:

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